

# Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?

---

## Final Report on the Geneva Colloquium held on 22 April 2006<sup>\*</sup>

---

*Gabrielle Kaufmann-Kohler<sup>\*</sup>*  
*Laurence Boisson de Chazournes<sup>\*\*</sup>*  
*Victor Bonnin<sup>\*\*\*</sup>*  
*Makane Moïse Mbengue<sup>\*\*\*\*</sup>*

---

<sup>\*</sup> This report was prepared and the Colloquium organized with the financial assistance of the following organizations: Swiss National Science Foundation, Federal Department of Foreign Affairs, Geneva Financial Center, Chambre de Commerce et d'Industrie de Genève, and Geneva Foundation, whose assistance is gratefully acknowledged.

<sup>\*</sup> Professor at Geneva University, Law School.

<sup>\*\*</sup> Professor at Geneva University, Law School.

<sup>\*\*\*</sup> Research assistant at Geneva University, Law School.

<sup>\*\*\*\*</sup> Teaching and research assistant at Geneva University, Law School.

## TABLE OF CONTENTS

<b>1</b>	<b>The Geneva colloquium on consolidation and this report . . . .</b>	<b>5</b>
1.1	The Geneva colloquium on consolidation . . . . .	5
1.2	This report . . . . .	6
<b>2</b>	<b>Existing instruments to handle multiple proceedings in civil procedure, commercial and investment arbitration . . . . .</b>	<b>7</b>
2.1	<i>Res judicata</i> and <i>lis pendens</i> . . . . .	8
2.2	Fork-in-the-road and waiver provisions . . . . .	9
2.3	Connexity . . . . .	11
2.4	Joinder of third parties . . . . .	13
2.5	Class actions and class arbitrations . . . . .	14
2.6	Creation of a special tribunal . . . . .	16
2.7	Alignment of tribunals or de facto consolidation . . . . .	16
2.8	State-to-state arbitration . . . . .	18
2.9	Publication of decisions . . . . .	19
2.10	Aggregate litigation . . . . .	20
2.11	Consolidation . . . . .	22
<b>3</b>	<b>Desirability and feasibility of consolidation . . . . .</b>	<b>23</b>
3.1	Consistency and avoidance of contradictory decisions . . . .	23
3.2	Efficiency: Saving time and costs . . . . .	25
3.3	Confidentiality . . . . .	26
3.4	Due process and case management . . . . .	27
<b>4</b>	<b>Conditions of consolidation in commercial and investment arbitration . . . . .</b>	<b>27</b>
4.1	Connexity . . . . .	27
4.2	Fair and efficient dispute resolution . . . . .	28
4.3	Consent of the parties . . . . .	29
4.4	Identity of dispute settlement mechanisms . . . . .	30
4.5	Other conditions: Consultation on consolidation . . . . .	32
4.6	Discretion to order consolidation . . . . .	32
<b>5</b>	<b>Implementation of consolidation in commercial and investment arbitration . . . . .</b>	<b>32</b>
5.1	Legal basis for consolidation . . . . .	32
5.1.1	In commercial arbitration . . . . .	32

5.1.2	In investment arbitration. . . . .	33
5.1.3	Especially, general powers of the arbitral tribunal to conduct the proceedings . . . . .	35
5.2	Who orders consolidation? . . . . .	35
5.2.1	In commercial arbitration . . . . .	35
5.2.2	In investment arbitration. . . . .	36
5.3	Who resolves the consolidated cases? . . . . .	37
5.3.1	In commercial arbitration . . . . .	37
5.3.2	In investment arbitration. . . . .	38
5.4	Other practicalities of consolidation . . . . .	39
5.4.1	Total or partial consolidation. . . . .	39
5.4.2	When to consolidate . . . . .	40
5.4.3	How to conduct the consolidated proceedings. . . . .	41
5.4.4	The nature of the decision to consolidate . . . . .	41
5.4.5	“Deconsolidation” and miscellaneous other matters . . . . .	45
<b>6</b>	<b>Consolidation in the practice of other dispute settlement mechanisms. . . . .</b>	<b>45</b>
6.1	The International Court of Justice . . . . .	46
6.1.1	Practice of the PCIJ and the ICJ with regard to consolidation . . . . .	46
6.1.2	The power of the ICJ in consolidating cases and procedures . . . . .	50
6.2	The International Tribunal for the Law of the Sea . . . . .	52
6.3	The Dispute Settlement Body of the World Trade Organization . . . . .	53
6.3.1	“Semi-consolidation” in the DSU . . . . .	55
6.3.2	Consolidating procedures without eliminating the possibility of multiple reports . . . . .	55
6.3.3	Consolidation of procedures, effective functioning of the dispute settlement mechanism, and the principle of due process. . . . .	58
6.3.4	Consolidation and third parties. . . . .	59
6.4	Final remarks on the practice of the ICJ, the ITLOS and the WTO . . . . .	59
<b>7</b>	<b>Conclusions . . . . .</b>	<b>60</b>

<b>ANNEXES.</b> . . . . .	62
North American Free Trade Agreement, Article 1126 . . . . .	62
United States Model Bilateral Investment Treaty (2004), Article 33 . . . . .	64
Model International Agreement on Investment for Sustainable Development of the International Institute for Sustainable Development (“IISD Model Agreement”), Annex 2, Article 12 . . . . .	66

## 1. THE GENEVA COLLOQUIUM ON CONSOLIDATION AND THIS REPORT

### 1.1 The Geneva colloquium on consolidation

This is the final report on the colloquium entitled, *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?*, which was held on April 22, 2006 in Geneva. The colloquium was co-organized by the Project on International Courts and Tribunals (PICT) and the private and public international law departments of the Geneva University School of Law. It brought together over 40 experts from all fields of international dispute settlement and all regions of the world.<sup>1</sup> A number of Ph.D. students, representing the future generation of scholars and practitioners, also participated in the event.

The initiative for the colloquium started from the observation that, increasingly, the same event or measure is likely to give rise to claims by multiple investors against the same State. Argentina's financial crisis is the foremost recent illustration of this phenomenon. So far, the crisis has generated 37 ICSID arbitrations. All these proceedings have certain issues in common, both on jurisdiction and on the merits, but they are all dealt with separately. The Argentine situation is not unique. Similar situations may well arise again tomorrow in other countries. Present developments in Bolivia, Ecuador and Venezuela inevitably come to mind.

Certain international dispute settlement mechanisms provide for consolidation of proceedings that have a common question of fact or law. The North America Free Trade Agreement (NAFTA) is a prominent example. Could consolidation be introduced more generally for investment arbitrations, whether they are conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention)

<sup>1</sup> The following persons attended the colloquium: Prof. Georges Abi-Saab; Prof. Manoush Arsanjani; Dr. Walid Ben Hamida; Prof. Karl-Heinz Böckstiegel; Prof. Laurence Boisson de Chazournes; Prof. Andreas Bucher; Judge Thomas Buergenthal; Prof. Christine Chinkin; Prof. Bernardo Cremades; Prof. Antonio Crivellaro; Mr. Gonzalo Flores; Prof. Emmanuel Gaillard; Prof. Bernard Hanotiau; Dr. Veijo Heiskanen; Dr. Kamal Hossain; Prof. Thordis Ingadottir; Prof. Gabrielle Kaufmann-Kohler; Prof. Catherine Kessedjian; Dr. Sabine Konrad; Prof. Pierre Lalive; Dr. Laurent Lévy; Ms. Ruth Mackenzie; Ms. Loretta Malintoppi; Prof. Sébastien Manciaux; Prof. Gabrielle Marceau; Mr. Antonio Parra; Mr. Jan Paulsson; Prof. Anne Petitpierre; Prof. Mónica Pinto; Mr. Daniel Price; Prof. Cesare Romano; Judge Allan Rosas; Prof. Robert Roth; Prof. Giorgio Sacerdoti; Prof. Philippe Sands, QC; Dr. Michael Schneider; Prof. Christoph Schreuer; Prof. Yuval Shany; Prof. Pierre Tercier; Prof. Luc Thévenoz; Prof. Tullio Treves; Dr. Eduardo Valencia Ospina; Mr. V. V. Veeder, QC; Prof. Raúl Vinuesa; Prof. Thomas Wälde; Sir Michael Wood; and Ms. Catherine Yannaca-Small.

or under other rules? Is consolidation at all desirable? If it is, how can it be implemented: by way of treaties or otherwise? What should the requirements for consolidation be? What purposes does it serve? How does consolidation improve efficiency in terms of costs and time? How does it help avoid contradictory results? Who should rule on consolidation? What form should consolidation take? Can it be partial? Does consolidation raise difficulties with respect to the consensual nature of arbitration, to confidentiality or to the constitution of the tribunal that will deal with the consolidated case? Are there other mechanisms that can achieve the same goals?

These were the main questions addressed at the colloquium. The colloquium focused on investment arbitration, but drew from the practice of other international tribunals, commercial arbitration and national courts.

## 1.2 This report

This report is a revised version of a preliminary report prepared by the Geneva University team to provide speakers, moderators and participants with the background information needed for the colloquium. It integrates findings and considerations from the colloquium.

The report begins by reviewing the instruments currently available to deal with situations involving more than two parties in civil procedure as well as in commercial and investment arbitration (2 below). It then focuses on consolidation, discussing first the arguments for and against it (3 below). Thereafter, the report seeks to establish the requirements that must be met for consolidation to be ordered, as established in commercial and investment arbitration (4 below). It then reviews the methods for implementing consolidation in the fields of international commercial and investment arbitration (5 below). Finally, the report examines the consolidation practice of other international dispute settlement mechanisms, specifically the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) (6 below), before reaching some conclusions (7 below).

The term “consolidation” can be understood in different ways.<sup>2</sup> For purposes of this report, consolidation is defined as the joinder of two or more proceedings that already are pending before different courts or arbitral tribunals. This report focuses on consolidation of proceedings pending before arbitral tribunals in investment disputes. It is limited to situations in which a host state faces claims

---

<sup>2</sup> B. Hanotiau, *Complex arbitration, Multiparty, Multicontract, Multi-issue and Class Actions* (2005), p. 179.

from a number of investors.<sup>3</sup> This situation must be distinguished from one in which several investors—for example, a local special vehicle company and its foreign shareholders—together commence an arbitration against the host state.

Building on this report, a working group led by the Geneva University team that co-organized the colloquium will draft practice guidelines on consolidation for consideration by states, arbitral institutions and potential parties.

Annexed to this report are two of the papers delivered at the colloquium, as well as a selection of texts on consolidation and the keynote address delivered by Judge Thomas Buergenthal of the ICJ at the dinner on the eve of the Colloquium.

## 2. EXISTING INSTRUMENTS TO HANDLE MULTIPLE PROCEEDINGS IN CIVIL PROCEDURE, COMMERCIAL AND INVESTMENT ARBITRATION

The purpose of this chapter is to review different instruments of civil procedure, commercial arbitration and investment law intended to handle multiple proceedings. Such a review will allow a better assessment of the place and function of consolidation and may provide inspiration when seeking ways to improve the efficiency of the resolution of multiple disputes brought under investment treaties.

Certain instruments address situations involving two or more proceedings between the same parties. This applies to *res judicata* and *lis pendens* (2.1), as well as to “fork-in-the-road” and waiver provisions (2.2). These instruments are of interest because they show a general tendency to avoid multiple proceedings. As they involve the same parties, however, they are of lesser significance when it comes to designing an effective consolidation mechanism. Thus, they will be reviewed only briefly. Other instruments involve the concentration of proceedings with different parties and, therefore, are closer to our topic. This is the case with the rule of connexity (2.3), to some extent the joinder of third parties (2.4), class actions and class arbitrations (2.5), the creation of special tribunals (2.6), and *de facto* consolidation (2.7). Still other instruments, in part, may achieve the same objectives as consolidation. This may apply to state-to-state arbitration (2.8) and to the publication of decisions (2.9), which both may reduce the risk of inconsistent decisions.

---

<sup>3</sup> The reverse situation, *i.e.*, one investor who has claims against several host states is conceivable, but much less likely to occur, and thus will not be considered.

Some instruments are based on a rule of international or national law, such as *res judicata* and *lis pendens*. Others are treaty-based—for instance, the fork-in-the-road, the waiver of an alternative forum and the creation of a special tribunal. Still others are based on the parties' agreement—for instance, the joinder of third parties provided in institutional arbitration rules chosen by the parties—while others have no basis other than the practice adopted by certain arbitral institutions, like the constitution of identical tribunals for different arbitration proceedings. Some instruments may have different bases depending on the setting in which they come up. This is particularly true of consolidation, which may be based on a treaty, national law, the parties' agreement or institutional rules.

## 2.1 *Res judicata* and *lis pendens*

The principle of *res judicata*, which can be considered a general principle of law in the meaning of Article 38(1)(c) of the Statute of the ICJ,<sup>4</sup> implies that a dispute cannot be adjudicated twice. It bars re-adjudication, provided there is identity of facts, cause of action and parties.<sup>5</sup>

Like court judgments, it is generally accepted that arbitral awards have a *res judicata* effect. In addition to many other sources, Article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) provides for such an effect.

*Lis pendens* is the corollary of *res judicata* in a situation where both proceedings are still pending.<sup>6</sup> It applies whenever two proceedings meeting the same identity tests as *res judicata* are pending before two courts of competent jurisdiction. In civil law procedure, a first-in-time rule applies, with the second-place court having to dismiss or stay the action. In common law procedure, no strict rule applies, and the court has discretion to either dismiss the action or rule on it.<sup>7</sup>

<sup>4</sup> B. Hanotiau, *L'autorité de chose jugée des sentences arbitrales, L'arbitrage complexe*, Special Supplement Bull. CI Arb. ICC 45 (2003), p. 45.

<sup>5</sup> *Id.* p. 46; A. Crivellaro, Consolidation of Arbitral and Court Proceedings in Investment Disputes, 4 Law & Practice of Int'l Courts and Tribs. 371 (2005), p. 381.

<sup>6</sup> On *lis pendens* in arbitration, see for instance A. Crivellaro, *supra* note 5, p. 378. See also Geisinger/Levy, *La litispendance dans l'arbitrage commercial international, L'arbitrage complexe*, Special Supplement Bull. CI Arb. ICC (2003), pp. 55 *et seq.*

<sup>7</sup> An example of a rule providing for a *lis pendens* defense can be found in Art. 27.1 of the Brussels Regulation 44/2001 (Brussels Regulation) or Art. 21(1) of the Lugano Convention of Sept. 16, 1988 (Lugano Convention), which reads as follows:

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.



Traditionally, commentators have considered the concept of *lis pendens* as irrelevant to international arbitration. Indeed, international arbitration is based on an agreement providing for the exclusive jurisdiction of the arbitral tribunal. The mere existence of such an agreement was deemed to preclude the concurrent exercise of jurisdiction by any judicial or arbitral body other than the chosen arbitral tribunal. Challenges to this traditional view have been increasing in recent years.<sup>8</sup>

## 2.2 Fork-in-the-road and waiver provisions

A fork-in-the-road provision is a clause in a treaty that requires the claimant to make an irrevocable choice of forum. It prevents the same dispute from arising in different fora.<sup>9</sup> The fork-in-the-road clause only comes into play with respect to the same dispute between the same parties.<sup>10</sup>

An example of a fork-in-the-road clause is found in Article 8.2 of the Argentina-France Bilateral Investment Treaty (BIT), which reads as follows:

2. Si le différend n'a pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des Parties concernées, il est soumis à la demande de l'investisseur:

- soit aux juridictions nationales de la Partie contractante impliquée dans le différend;
- soit à l'arbitrage international, dans les conditions décrites au paragraphe 3 ci-dessous.

*Une fois qu'un investisseur a soumis le différend soit aux juridictions de la Partie contractante concernée, soit à l'arbitrage international, le choix de l'une ou de l'autre de ces procédures reste définitif.*<sup>11</sup>

<sup>8</sup> The Swiss Supreme Court, for instance, has held that the *lis pendens* defense applies in arbitration. ATF 127 III 279, Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.; See Kaufmann-Kohler/Stucki, International Arbitration in Switzerland, A Handbook for Practitioners (2004), pp. 30 *et seq.* However, a bill is pending in the Swiss Parliament providing that the arbitral tribunal shall not stay a proceeding for *lis pendens*, save in exceptional circumstances.

<sup>9</sup> A. Crivellaro, *supra* note 5, p. 395.

<sup>10</sup> *Id.*

<sup>11</sup> Emphasis added. In the authors' translation into English, the text reads:

If the dispute could not be solved within six months from the moment it was raised by either concerned Party, it shall be submitted at the investor's request:

- either to the national jurisdictions of the Contracting Party involved in the dispute
- or to international arbitration, under the conditions described in paragraph 3 hereunder.

*Once an investor has submitted the dispute either to the jurisdiction of the contracting Party involved or to international arbitration, his choice of procedures is considered final.*

The waiver of all alternative fora is similar to the fork-in-the-road clause. It seeks to avoid the same problem—the same dispute arising in different fora. An example of such a waiver is found in Article 1121(1) of the NAFTA, which reads as follows:

A disputing investor may submit a claim under Article 1116 to arbitration only if:

- (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
- (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.<sup>12</sup>

In this context, one should also mention Article 26 of the ICSID Convention, which provides that “unless otherwise stated,” consent to arbitration under the Convention is “to the exclusion of any other remedy.” Similarly, Article 27 of the ICSID Convention prohibits a Contracting State from giving diplomatic protection, or bringing an international claim in connection with a dispute “which one of its nationals or another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention.”<sup>13</sup> Although different from the NAFTA waiver provision, these rules show the intent of the ICSID Convention’s drafters to concentrate the settlement of the dispute in a single forum.

---

<sup>12</sup> This instrument is closer to consolidation than the fork-in-the-road clause, because it does not focus on the identity of the disputes, but on the State measure from which the dispute arises. *See* A. Crivellaro, *supra* note 5, p. 397.

<sup>13</sup> The prohibition does not apply if the other Contracting State has failed to comply with the award.

### 2.3 Connexity

Certain civil procedure rules allow the concentration of related or connected disputes in one forum. The foremost example is Article 28 of the Brussels Regulation, which provides as follows:

1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seized may also, on application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.<sup>14</sup>

Accordingly, the court seized of the second (related) dispute *may* stay the action to await and take into consideration the decision of the first court when issuing its own decision. The use of the word “may” shows that it can also refuse to stay, and rule on the action. It has a third choice—to dismiss the action—which can then be brought before the court seized of the first dispute. In other words, a court faced with a connexity defense has broad discretion, unlike a court faced with a *lis pendens* defense.<sup>15</sup>

However, when are two disputes related or connected? No strict requirements apply; in particular, there is no requirement that the same parties be involved in both actions. Whether two disputes are related or connected sufficiently is subject to the court’s assessment.<sup>16</sup> In its assessment, the court will take into account the definition provided in Article 28.3 of the Brussels Regulation, which reads as follows:

Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.<sup>17</sup>

<sup>14</sup> See also Art. 22.1 and 22.2 of the Lugano Convention.

<sup>15</sup> H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (2002), p. 277.

<sup>16</sup> *Id.* p. 276; J. Kropholler, *Europäisches Zivilprozessrecht: Kommentar zu EuGVO, Lugano-Übereinkommen und europäischem Vollstreckungstitel* (2005), p. 366.

<sup>17</sup> See also Art. 22.3 of the Lugano Convention, which uses the same language.

This definition requires that the judgments be intellectually irreconcilable—for example, one judgment holds that a contract is null and void, while the other deems it valid. It does not require that the contradiction be such that the judgments cannot both be enforced.<sup>18</sup> A good example of a dispute the Court of Justice of the European Communities (ECJ) found to meet this definition is in *The Ship Tatry* case. In this decision, the ECJ held:

Consequently the term “irreconcilable [...] judgment” there referred to must be interpreted by reference to that objective. The objective of the third paragraph of Article 22 of the Convention, however, is, as the Advocate General noted in his Opinion (paragraph 28), to improve coordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, even where the separate enforcement of each of them is not precluded. [...] On a proper construction of Article 22 of the Convention, it is sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a Contracting State by one group of cargo owners against a ship owner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another Contracting State against the same ship owner by the owners of another part of the cargo shipped under the same conditions and under contracts which are separate from but identical to those between the first group and the ship owner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences.<sup>19</sup>

Concentration of related but different disputes in one forum is very close to consolidation of multiple disputes in investment arbitration. Therefore, the definition of the Brussels Regulation may be of assistance when designing an effective consolidation mechanism.

<sup>18</sup> This would for instance be the case if one judgment were to award a painting to one party, while the other judgment awards the same painting to another party.

<sup>19</sup> Case C-406/92, Judgment of Dec. 12, 1994, the *Tatry / Maciej Rataj*, paras. 54 and 57. *See also* Case C-39/02, Judgment of Oct. 14, 2004, *Mærsk Olie & Gas / Firma M. de Haan en W. de Boer*, paras. 40 and 41.

## 2.4 Joinder of third parties

Contracts involving several parties and containing an arbitration clause are a common occurrence in international commerce. One also frequently encounters parties linked by multiple contracts. Consequently, it is not surprising that a third of all cases submitted to International Chamber of Commerce (ICC) arbitration in 2002 were multiparty procedures.<sup>20</sup> Despite such statistics, most national arbitration statutes and many institutional rules take a bipolar view of the arbitral procedure.<sup>21</sup>

Joinder is a process that allows tribunals to add third parties to proceedings when the original defendant claims to be jointly liable with a third party or simply claims not to be liable due to the fault of a third party. This procedure allows tribunals to gather all the relevant parties and to settle all the different disputes between these parties.<sup>22</sup>

Certain institutional rules provide for the possibility of joining third parties to the arbitration. This is, for instance, the case of Article 4 of the Swiss Rules of International Arbitration (Swiss Rules),<sup>23</sup> Article 22.1.h of the Rules of the London Court of International Arbitration (LCIA),<sup>24</sup> or Rule 25 of the International Rules of the Singapore International Arbitration Centre (SIAC).<sup>25</sup> The joinder mechanism differs from the consolidation procedure addressed in

<sup>20</sup> Whitesell/Silva-Romero, *L'arbitrage à pluralité de parties ou de contrats: l'expérience récente de la Chambre de commerce internationale, L'arbitrage complexe*, Special Supplement Bull. CI Arb. ICC 1 (2003), p. 7.

<sup>21</sup> Y. Derains, *Les limites de la convention d'arbitrage dans les contrats impliquant plus de deux parties, L'arbitrage complexe*, Special Supplement Bull. CI Arb. ICC 27 (2003), p. 33.

<sup>22</sup> Woollet/Sasson, *Multi-Party Arbitration*, 1 S. A. R. 1 (2002), p. 10.

<sup>23</sup> It reads as follows:

2. Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

<sup>24</sup> It reads as follows:

Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to State their views: [...]

h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration..

<sup>25</sup> It reads as follows:

The Tribunal has power to: [...] (b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them.

this report in two important respects. First, joinder implies some contractual connection between the existing parties and the party to be joined. Second, joinder implies that there are no concurrent proceedings—in other words, the party to be joined is not already involved in proceedings.

## 2.5 Class actions and class arbitrations

A class action allows a plaintiff to sue for injuries on his or her own behalf and on behalf of third persons in a similar situation for injury done to them.<sup>26</sup> While class actions are popular in the United States,<sup>27</sup> as well as in other common law countries,<sup>28</sup> civil law countries are reluctant to enact or apply such a mechanism. Where it exists, it usually is limited to certain types of claims, such as consumer claims. Sometimes the participation in mass consumer proceedings is restricted even further to consumer associations only. Notwithstanding these reservations, the trend is evolving towards more mass proceedings even in countries traditionally opposed to them.<sup>29</sup> This trend takes two forms: the vindication of diffuse interests through claims by associations, and the vindication of interests of individuals affected by the same category of harmful occurrence who form a defined group that transfers its right of action to a representative, be it a public trustee or an association.<sup>30</sup>

Keeping aside actions by associations, class actions generally are based on a system of certification of the class and notification to the members of the class.<sup>31</sup>

<sup>26</sup> B. Hanotiau, *supra* note 2, p. 260.

<sup>27</sup> Rule 23 of the U.S. Federal Rules of Civil Procedure (FRCP). *See also* the Class Action Fairness Act, Feb. 18, 2005, which enlarges the federal jurisdiction. For more information about the Class Action Fairness Act; *see* Simmons/Borden, *The Defense Perspective: the Class Action Fairness Act of 2005 and State Law Antitrust Actions*, 20 Antitrust ABA 19 (2005).

<sup>28</sup> In Australia, representative proceedings (Federal Court of Australia Amendment Act 1991, No. 181); in the United Kingdom: Group Litigation Civil Procedure (Amendment) Rules (Rule 19); in Canada: Class Procedures Act of British Columbia, Class Proceedings Act of Alberta, and Class Proceedings Act of Ontario.

<sup>29</sup> The Swedish Group Proceedings Act of 2002 provides for proceedings similar to the U.S. class action. In France, class actions do not exist, but actions can be filed by consumer associations (Art. 421 *Code de la consommation*). The French Senate debates whether to introduce class actions, Senate Information Report No. 249, session of Mar. 14, 2006. In Spain, class actions are provided for consumer litigation (*see in part* Arts. 6.1.7, 7.7, 11, 13.1, 15 of the Civil Procedure Act).

<sup>30</sup> G. D. Watson, *Class Actions, the Canadian Experience*, 11 Duke J. Comp. & Int'l L. 269 (2001), p. 273.

<sup>31</sup> To be certified as a class action, the claim must satisfy several prerequisites: commonality, numerosity or impracticability of joinder, typicality, representativeness and adequate definition of the class. B. Hanotiau, *supra* note 2, p. 262; I. Romy, *Class actions américaines et droit international privé suisse*, 7 AJP 783 (1999), p. 786; G. D. Watson, *supra* note 30, p. 273; Marcus/Sherman, *Complex Litigation, Cases and Materials on Advanced Civil Procedure* (1998), pp. 220 *et seq.*

Each member can then opt out of or into the proceedings, depending on the applicable legal system.<sup>32</sup> The exercise or non-exercise of the option will determine whether the forthcoming judgment is binding on a given class member.

Class actions usually are submitted to the courts. In recent years, however, there has been a movement in the United States in favor of resolving class actions through arbitration. In *Green Tree v. Bazzle*,<sup>33</sup> the U.S. Supreme Court held that class arbitration may be available even if the contract is silent, and that the arbitrators have the power to decide whether the contract allows class arbitration or not. It further held that the arbitrators have the power to certify the class.<sup>34</sup>

Arbitral institutions take diverging approaches to class arbitration. The ICC issued a statement opposing class actions, which must be seen as an opposition to class arbitrations as well. Conversely, following *Bazzle*, the American Arbitration Association (AAA) drew up its Supplementary Rules for Class Arbitrations. These rules are inspired from the U.S. Federal Rules of Civil Procedure and provide for a regime of arbitral certification and notification of the class. The parties can opt out of these rules, and the AAA does not administer requests for class actions where the agreement prohibits class claims, consolidation or joinder, unless the courts compel the parties to submit their disputes to arbitration or to the AAA.<sup>35</sup>

As a consequence of *Bazzle* and the increasing popularity of class arbitrations, companies now often include waivers of class arbitration in their standard contract terms. The validity of such a waiver currently is unsettled,<sup>36</sup> and the

<sup>32</sup> See Rule 23.c. 2 of the U.S. FRCP; Art. 33.J of the Federal Court of Australia Amendment Act 1991, No. 181; Sections 13 and 14 of the Swedish Group Proceedings Act.

<sup>33</sup> *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Prior to *Bazzle*, the courts decided whether class arbitration was available, and absent an express agreement, it was deemed precluded.

<sup>34</sup> Previously, *Knepp v. Credit Acceptance Corp.* (In re *Knepp*), 229 B.R. 821 (Bankr. D. Ala. 1999) appears to have been the only case not reversed that held that arbitration would interfere with class action relief and would eliminate any opportunity for effective redress. See also Hagans/Rustay, *Class Actions in Arbitration*, 25 Rev. Litig. 293 (2006), p. 307.

<sup>35</sup> AAA Policy on Class Arbitrations Notice published on July 14, 2005, available at <<http://www.adr.org/sp.asp?id=25967>>, last visited on May 31, 2006. The AAA is administering about 95 class arbitrations at present.

<sup>36</sup> Among others, one may refer further to the following cases: *Zawikowski v. Beneficial Nat'l Bank*, 1999 U.S. Dist. LEXIS 514 (D. Ill. 1999) (an arbitration agreement prohibiting class arbitration unless all parties consent to it was held admissible); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (Cal. Ct. App. 2002) (the contract provision prohibiting class arbitration was deemed null and void on grounds of unconscionability and violation of public policy); *Luna v. Household Fin. Corp.* Iii, 236 F. Supp. 2d 1166, 1183 (D. Wash. 2002). See also, *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005), a case in which the California Court of Appeal admitted the waiver, but the California Supreme Court held that the waiver involving consumer claims was unconscionable under California law and should not be enforced.



U.S. Supreme Court has still to rule on it.<sup>37</sup> It remains to be seen whether and to what extent the mechanism of class actions and arbitrations may inspire workable solutions for the consolidation of multiple proceedings in investment arbitration.

## 2.6 Creation of a special tribunal

One method to resolve multiple disputes arising out of the same event is to create a special tribunal and entrust it with the settlement of all such disputes. This method has the obvious advantage of allowing the tribunal and the procedures to be shaped in accordance with the characteristics of the disputes and the needs of an efficient administration of justice. It requires, however, the existence of political will and the availability of significant resources. These requirements are likely to be met only for major crises or as a result of strong pressures.

As examples of such special tribunals in the last decades, one may cite the Iran-U.S. Claims Tribunal created by the Algiers Accords of 1981 following the Iranian revolution; the United Nations Compensation Commission created by Resolution 692 of the Security Council following the Iraqi invasion of Kuwait in 1990; the Claims Resolution Tribunal for Dormant Accounts created by a private agreement entered into by two Jewish organizations and the Swiss Bankers' Association in 1996; and the German Forced Labour Compensation Program based on an agreement between Germany and the United States in 2000.<sup>38</sup>

## 2.7 Alignment of tribunals or *de facto* consolidation

Another method for handling connected claims is arbitral institutions setting up, or encouraging the parties to set up, tribunals composed of the same arbitrators for related cases. Examples in recent ICSID practice are *Salini v. Morocco and R.F.C.C. v. Morocco*,<sup>39</sup> the four *Agua v. Argentina* water

<sup>37</sup> A party attempted to have the Supreme Court review the enforceability of the waiver in *Cingular Wireless, LLC v. Mendoza et al.* The Court declined, however, to review that later and denied certiorari in June 2006. The procedural history of such case is complex. The unreported opinion which resulted in the certiorari petition is *Parrish v. Cingular Wireless, LLC* of the Californian Court of Appeal (No. A105518 of Nov. 2, 2005).

<sup>38</sup> On these mechanisms, see Boisson de Chazournes/Quéguiner/Villalpando, *Crimes de l'histoire et réparations: les réponses du droit et de la justice* (2004).

<sup>39</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4; *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6.



concession cases,<sup>40</sup> and the two *EDF v. Argentina* electricity concession cases.<sup>41</sup>

Although this practice allows the avoidance of inconsistent results,<sup>42</sup> it does not necessarily permit rationalizing the use of resources, as submissions, hearings and decisions are often separate for each proceeding. Moreover, this method may raise issues of due process if a tribunal relies on knowledge acquired in one case to resolve another. This concern arose, for instance, in the 1982 *Adgas* case,<sup>43</sup> in which the same arbitrator was appointed to decide two related arbitrations. However, in the absence of consent, the arbitrator declined to hear both arbitrations together,<sup>44</sup> despite Lord Denning's suggestions to that effect.<sup>45</sup>

<sup>40</sup> Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17; Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/18; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19; and one UNCITRAL arbitration.

<sup>41</sup> Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic, ICSID Case No. ARB/03/22; EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23.

<sup>42</sup> The risk of inconsistent results might arguably exist even with *de facto* consolidation, or at least that was the view expressed by the High Court of Hong Kong in the *Shui On* case, *Re Shui On Construction Ltd. and Schindler Lifts (HK) Ltd*, HKLR 117 (1986), Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XIV (1989), p. 215. See H. Miller, Consolidation in Hong Kong: the *Shui On* case, 3 Arb. Int'l 87 (1987), p. 88.

<sup>43</sup> Abu Dhabi Gas Liquefaction Co. Ltd v. Eastern Bechtel Corp. (hereinafter *Adgas*), 2 Lloyd's Rep. 425, CA (1982); XXI International Legal Materials 1057 (1982); Rev. Arb. 119 (1983); Yearbook Commercial Arbitration 448 (1984).

<sup>44</sup> V.V. Veeder, *England, in* Jan Paulsson (Ed.), International Handbook on Commercial Arbitration, Supp. 23, 1997, fn. 34.

<sup>45</sup> *Adgas* *supra* note 43. At relevant part the decision reads:

At an early stage, he [the arbitrator] should have held what may be called a "pre-trial conference" with all the parties in the two arbitrations. At the pre-trial conference there should be a segregation of issues. There will be some issues which can be separated and can be decided by themselves. They should be decided in the first arbitration at that stage. If necessary, there can be recourse to the courts on points of construction and so forth. At all events, points which can be separated should be dealt with separately in the first place. There may be some which cannot be separated—namely, the very important point of causation. In those circumstances, the arbitrator will have control of the case. At the second stage, he may well think it right to be relieved from arbitrating any further in the arbitration. He can then be replaced by a new arbitrator in respect of those issues. That can be done on application. In that way, all the parties can feel that there has been a fair hearing; and that they will not have been prejudiced by any preconceived notions of the one arbitrator.

## 2.8 State-to-state arbitration

The ICSID Convention provides that disputes concerning its interpretation or application will be submitted to the ICJ's jurisdiction.<sup>46</sup> Similarly, BITs provide for state-to-state dispute settlement through arbitration, if other alternative methods, such as consultations, good offices, mediation or consultation, have failed.<sup>47</sup> These dispute settlement procedures are intended to achieve uniform interpretation and application of the BITs.<sup>48</sup>

The coexistence of investor-state and state-to-state arbitration provisions in a treaty entails the risk of multiple procedures related to the same dispute. Article 27 of the ICSID Convention seeks to avoid the occurrence of this risk by providing that “[n]o Contracting State shall . . . bring an international claim, in respect of a dispute which one of its nationals shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.” Some BITs include similar restrictions.<sup>49</sup> Where such restrictions exist, the risk of multiple proceedings may, nevertheless, arise to some extent. Indeed, the restriction does not apply before the investor-state claim is brought, nor does it prevent a state from bringing an interstate arbitration on an abstract issue of treaty interpretation even while an investor-state claim is pending.<sup>50</sup> On a broad reading of Article 27, the tribunal in the interstate

<sup>46</sup> Art. 64 of the ICSID Convention reads as follows:

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

<sup>47</sup> Art. 37 of the U.S. Model BIT; Ch. 22 of the Chile-U.S. Free Trade Agreement (FTA); Ch. 20 of the U.S.-Morocco FTA; Ch. 20 of the NAFTA; Ch. 20 of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR); Ch. 15 of the Japan-Mexico FTA; Ch. 18 of the Australia-Thailand FTA; Art. 9 of the Switzerland-Uruguay BIT.

<sup>48</sup> See also Art. 37 of the U.S. Model BIT, Art. 150 of the Japan-Mexico FTA, Art. 9 of the Switzerland-Uruguay BIT, Art. 10 of the Chile-Switzerland BIT, Art. 1801 of the Australia-Thailand FTA (mentioning disputes concerning the implementation of the agreement).

<sup>49</sup> Art. 10.4 Switzerland-Uruguay BIT allows state-to-state arbitration when an award on a dispute between the investor and the host state has been decided, only when the host state rejects or does not comply with the award. See also Ch. 8, Art. 14.6 Singapore-Australia FTA; Art. 917 Thailand-Australia FTA; and provisions cited in Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), p. 404; and in W. Ben Hamida, *L'arbitrage transnational face à un désordre procédural: la concurrence des procédures et les conflits de juridictions*, *Transnational Dispute Management* (March 2006), p. 16 (provisional version).

<sup>50</sup> See W. Ben Hamida, *supra* note 49. Consent is not given by the investor to arbitration under an investment treaty provision until he explicitly accepts it or starts proceedings. Hence, before such a time, Art. 27 of the ICSID Convention does not apply (see Schreuer, *supra* note 49, p. 409), nor do similar BIT provisions.

arbitration may well decline jurisdiction if the claim is brought to obstruct or influence the investor-state proceedings.<sup>51</sup>

It has been suggested that state-to-state arbitration may be an alternative to consolidation. Indeed, state-to-state arbitration could provide a general answer to an issue of interpretation of the BIT, which may then be applicable to disputes between one of the contracting states and a (possibly large) number of individual investors. At the same time, however, such an alternative has a number of drawbacks, which may well jeopardize its usefulness in most cases.

First, a state may be unwilling to commence an arbitration against the other contracting state, for reasons unrelated to the actual investment and dispute. State-to-state investment arbitration has many of the known disadvantages of diplomatic protection, which investor-state arbitration precisely was meant to overcome.<sup>52</sup> Second, this alternative would imply a duplication of proceedings, which is precisely what consolidation seeks to avoid. In addition to increased costs, the duplication would entail significant delays, as it would be necessary to await the decision rendered in the state-to-state arbitration to apply it in the individual investor-state proceeding. There would not be duplication if the investors and the host state are able to settle their dispute on the basis of the decision issued in the state-to-state arbitration. If there are strong and realistic expectations that the dispute may be settled once a key issue submitted to state-to-state arbitration is resolved, then such a method may be worth considering. Yet, in this context, it should also be stressed that the issue of the jurisdiction of the interstate arbitration tribunal and the issue of the stay of the investor-state arbitration tribunal would have to be settled by agreement. Third, state-to-state arbitration would only be a substitute for consolidation where all investors are of the same nationality, a restriction that does not apply to consolidation and that considerably limits the use of state-to-state arbitration in practice.

## 2.9 Publication of decisions

Whenever confidentiality is not a bar, the publication of decisions and awards can help minimize the risk of inconsistency. Indeed, a review of case law shows that arbitrators take decisions of other international tribunals into account even though there is no doctrine of precedent in international law and Article 53 of the ICSID Convention provides that awards are binding only on the parties.

<sup>51</sup> Schreuer, *supra* note 49, p. 405.

<sup>52</sup> J. L. Brierley, *The Law of Nations: An Introduction to the International Law of Peace* (1963), p. 277.

ICSID has a well-established practice of publishing decisions and awards if the parties agree, as provided for in Article 48(5) of the ICSID Convention.<sup>53</sup> Even if the parties do not consent to publication, the ICSID Arbitration Rules authorize the Centre to publish excerpts of the legal reasoning of the tribunal.<sup>54</sup> Moreover, ICSID publishes the names of the parties, the identity of the tribunal members and the procedural progress of each case on its website. This allows for some scrutiny and awareness of existing cases even if they are not yet, nor ever, published.<sup>55</sup> In addition, many decisions in ICSID and NAFTA cases are posted on the Internet even if they are not published by ICSID.<sup>56</sup>

Due to confidentiality requirements, publication is more restricted with respect to arbitrations conducted under other institutional rules and in *ad hoc* arbitrations.<sup>57</sup>

## 2.10 Aggregate litigation

When reviewing the tools to deal with multiple and related proceedings, it may be worthwhile to consider the American Law Institute's recent Draft

<sup>53</sup> Art. 48(5) of the ICSID Convention reads as follows: "The Centre shall not publish the award without the consent of the parties."

<sup>54</sup> Rule 48(4) of the ICSID Arbitration Rules reads as follows:

The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

This Rule was recently amended in order to allow the Centre to publish at least some excerpts when the parties take several months to give their consent or simply do not give it at all. See, ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper, Oct. 22, 2004, available at <[www.worldbank.org/icsid/highlights/DiscussionPaper.pdf](http://www.worldbank.org/icsid/highlights/DiscussionPaper.pdf)>, last visited June 30, 2006, pp. 7 *et seq.*

<sup>55</sup> B. King, Consistency of Awards in Cases of Parallel Proceedings Concerning Related Subject Matters, in E. Gaillard (ed.), *Towards a Uniform International Arbitration Law?* (2005), p. 312.

<sup>56</sup> See, e.g., <[www.nafta-sec-alena.org/](http://www.nafta-sec-alena.org/)> last visited June 30, 2006; <[www.investmentclaims.com/](http://www.investmentclaims.com/)> last visited June 30, 2006; <<http://www.naftaclaims.com/>>, last visited June 30, 2006.

<sup>57</sup> Art. 32.5 of the UNCITRAL Rules allows publication only with the consent of the parties. The ICC Arbitration Rules contain no provisions regarding publications and confidentiality. However, Article 6 of the Statutes of the ICC Court provides that the work of the ICC Court is confidential. Further, Art. 1.3 of the Internal Rules establishes that "the documents submitted to the Court, or drawn up by it in the course of its proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the Chairman to attend Court sessions." Since the awards are documents submitted to the ICC Court, there is no doubt about their confidential nature. Exceptions can be granted for research and educational purposes, as provided in Article 1.4 of the Internal Rules. Indeed, the ICC publishes summaries of ICC awards in its Bulletin or in the book series "Collection of ICC Arbitral Awards," which contains awards since 1974. The awards are not identified by party names. For more information about confidentiality of awards under the ICC Rules, see Craig/Park/Paulsson, *International Chamber of Commerce Arbitration* (2000), pp. 311 *et seq.*

Principles of the Law of Aggregate Litigation.<sup>58</sup> Designed for court litigation, this draft seeks to promote efficiency in the use of litigation resources while treating equitably the interests of all the parties and others involved. Procedures for aggregating claims are designed to respect the rights and remedies provided by substantive law (the principle of fidelity), the institutional capability of the courts (the principle of feasibility), and the interests of all affected parties and other persons.<sup>59</sup>

The main characteristic of aggregation is to treat common issues together. In that sense, it is close to consolidation as the term is defined in this report.

The draft addresses a broad range of procedural situations. It covers three types of aggregate lawsuits,<sup>60</sup> two of which are relevant for the purposes of this report: (i) joinders, which encompass all forms of proceedings with multiple claimants and respondents as formal parties and which resemble consolidation as dealt with in this report; and (ii) administrative aggregation, which encompasses the coordination of separate lawsuits and is analogous to *de facto* consolidation considered in the following subchapter.<sup>61</sup> Aggregate treatment may include actions in which the parties seek indivisible and divisible remedies, the latter typically being monetary damages. In this respect, the purpose of aggregation is to “maximize the net value of a group of claims,” for example, of the monetary relief awarded after litigation costs are deducted.<sup>62</sup>

Aggregate treatment is a matter of judicial decision. In exercising its discretion “at an early practical time,” the court will start by identifying possible common issues, which are defined as “those legal or factual issues that are identical or substantially identical in content across multiple civil claims, regardless of whether their disposition would resolve all contested issues in litigation.”<sup>63</sup> The court will then give notice to the parties and ascertain that their rights are protected. It will also pay attention to the judicial feasibility of aggregation. It “should not lightly undertake aggregate treatment of a common issue or of related claims,” but should do so only “upon careful consideration of the procedural alternatives” and “the articulation of the specific procedures

<sup>58</sup> Discussion Draft 1 of April 1, 2006.

<sup>59</sup> *Id.* para. 1.01.

<sup>60</sup> *Id.* These are called judicial aggregations, as opposed to private aggregations, where multiple parties proceed under non-judicial supervision, such as inventory settlements (para. 1.02).

<sup>61</sup> *Id.* The third type deals with so-called representative aggregations, *i.e.*, lawsuits in which a formal party stands in judgment on behalf of others who are not formal parties, such as class actions (para. 1.02(a) and Comment).

<sup>62</sup> *Id.* Comment (e) to para. 1.05.

<sup>63</sup> *Id.* para. 2.02.

for the aggregate proceeding.”<sup>64</sup> This latter obligation is cast in terms of the formulation of a trial plan.<sup>65</sup>

For our purposes, the draft Principles on Aggregate Litigation are of interest primarily because they are representative of a general concern for efficiency in the use of dispute resolution resources. On a more practical level, they are instructive especially for the emphasis they place on procedural feasibility and the need to formulate procedures for the joint proceedings, matters which also must be considered carefully when consolidating investment disputes.

## 2.11 Consolidation

Although its use remains exceptional, consolidation is provided for in a number of legal texts, including:

- National arbitration statutes such as Article 1446 of the Netherlands Arbitration Act 1986 (Code of Civil Procedure (NCCP)) or Section 24 of the Australian International Arbitration Act (AIAA);<sup>66</sup>
- Institutional rules: only a few institutional rules contain a provision on consolidation. Among these are Article 4 of the Swiss International Arbitration Rules and Article 7 of the Arbitration Rules of the Mexico Arbitration Centre (MAC);<sup>67</sup>
- International treaties: recent investment treaties increasingly incorporate rules on consolidation. These include Article 1126 of the NAFTA, Article 33 of the U.S. Model BIT,<sup>68</sup> and Article 32 of the Canadian Model BIT.

As mentioned above, in this report the term “consolidation” refers to the joinder of two or more proceedings that already are pending before different tribunals. The report focuses on consolidation of proceedings pending before arbitral tribunals in investment disputes. It is limited to situations in which a host state faces claims from a number of investors. This situation must be distinguished from the one in which several investors—for instance, a local

<sup>64</sup> *Id.* Comment to para. 2.13.

<sup>65</sup> *Id.* para. 2.13.

<sup>66</sup> See also Section 35 of the English Arbitration Act (EAA) and Section 9 of the Ireland Arbitration (International Commercial) Act (IAICA), which are less detailed.

<sup>67</sup> See also Art. 7 of the Arbitration Rules of the American Land Title Association.

<sup>68</sup> As well as a number of other treaties concluded by the United States, specifically Art. 33 of the Uruguay-U.S. BIT; Art. 15.24 of the U.S.-Singapore FTA; Art. 10.24 of the U.S.-Morocco FTA; and Art. 10.24.2 of the Chile-U.S. FTA.

special vehicle company and its foreign shareholders—start an arbitration against the host state together. Accordingly, the definition used here does not cover multiparty or multicontract arbitrations and joinder of third parties in their traditional meaning, nor joinder of different claims between the same parties.

As will be discussed in more detail below, consolidation is available if there is a connection between the proceedings and if it contributes to efficient dispute settlement. Other requirements are more controversial, especially the necessity of consent.

### 3. DESIRABILITY AND FEASIBILITY OF CONSOLIDATION

Consolidation primarily presents advantages related to the efficient administration of justice and cost savings (3.2 below).<sup>69</sup> Indeed, dealing with the same or related matters in separate proceedings can result in much inefficiency. In particular, consolidation relieves a state from the hardship of having to defend itself separately against multiple claims arising from the same measure.<sup>70</sup> It has the further advantage of avoiding contradictory decisions on the same state measure. On the other hand, consolidation also has drawbacks, mainly risks of violation of due process (3.4 below) and of confidentiality (3.3 below).

#### 3.1 Consistency and avoidance of contradictory decisions

Dealing with the same situation in different proceedings can result in contradictory decisions.<sup>71</sup> In the terms used by the *Softwood Lumber* tribunal:

Cases with different parties may present the same legal issues arising out of the same event or related to the same measure. Conflicting results may take place if the findings with respect to those issues differ in two or more cases.<sup>72</sup>

<sup>69</sup> Order of the Consolidation Tribunal, Sept. 7, 2005, granting the consolidation of the cases *Canfor Corporation v. United States of America*, *Tembec et al. v. United States of America* and *Terminal Forest Products Ltd. v. United States of America* (hereinafter *Softwood Lumber*), n. 76, using the term “procedural economy.”

<sup>70</sup> H.C. Alvarez, *Arbitration under the North American Free Trade Agreement*, 16 Arb. Int'l 393 (2000), p. 414.

<sup>71</sup> The advantages of consistency and avoidance of contradictory decisions have also been raised for the joinder of third parties and the joinder of claims and proceedings between the same parties. P. Level, *La jonction de procédures, intervention de tiers et demandes additionnelles et reconventionnelles*, 7 Bull. CI Arb. ICC 36 (1996), pp. 39, 43; Whitesell/Silva-Romero, *supra* note 20, p. 17.

<sup>72</sup> *Softwood Lumber*, *supra* note 69, n. 133.



The recent decisions in the *CME / Lauder* cases have shown that the risk of contradictions is real. It is made even more real by the fact that arbitral awards are not subject to appeal, but only to limited review. In such proceedings, the court (or another body) will not re-examine the facts or the application of the law (subject to public policy).<sup>73</sup> It is also said that the risk of contradiction increases when the substantive and procedural laws applied in the different cases are not the same.<sup>74</sup>

Consolidation is generally deemed to avoid conflicting decisions.<sup>75</sup> The *Softwood Lumber* consolidation tribunal shared this view when it stated that an effective administration of justice requires the avoidance of conflicting results through a system of consolidation.<sup>76</sup>

While the objective of avoiding conflicting outcomes through consolidation prevailed in *Softwood Lumber* and in other cases,<sup>77</sup> it must sometimes yield to other interests or considerations. For instance, the U.S. Court of Appeals for the Second Circuit held in *United Kingdom v. Boeing* that even though inconsistent determinations may be a valid concern, it could not allow the tribunal to reform the parties' contract and that the parties should have provided for consolidation in the arbitration clauses.<sup>78</sup> In other words, the enforcement of the contract prevailed over the avoidance of inconsistent decisions.

Another factor against which the objective of consistency must be weighed is the fairness (or lack of fairness) of consolidated proceedings. This is a consideration that led the *Corn Products* tribunal to rule against consolidation in the following terms:

<sup>73</sup> E. Gaillard, *Jonction de procédures arbitrale et judiciaire, L'arbitrage complexe*, Special Supplement Bull. CI Arb. ICC 37 (2003), p. 38; P. Leboulanger, *Multi-contract Arbitration*, 13 J. Int'l Arb. 43 (1996), p. 63; J. C. Chiu, *Consolidation of Arbitral Proceeding and International Arbitration*, 7 J. Int'l Arb. 53 (1990), p. 56.

<sup>74</sup> B. Hanotiau, *Complex—Multi-contract Multi-party—Arbitrations*, 14 Arb. Int'l 369 (1998), p. 391.

<sup>75</sup> E. Wallace, *Consolidated Arbitration in the U.S—Recent Authority Requires Consent of the Parties*, 10 J. Int'l Arb. 5 (1993), p. 17.

<sup>76</sup> *Softwood Lumber*, *supra* note 69, n. 131.

<sup>77</sup> *Taunton-Collins v. Cromie*, 2 All ER 332 (1964), 1 WLR 633 (1964). *See also the Adgas case*, *supra* note 43, where Lord Denning argued in favor of *de facto* consolidation:

"It seems to me that there is ample power in the court to appoint in each arbitration the same arbitrator. It seems to me highly desirable that it should be done so as to avoid inconsistent findings...."

<sup>78</sup> *Government of United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993); 1993 U.S. App. LEXIS 15955; 26 Fed. R. Serv. 3d (Callaghan) 33; 1993 AMC 2906.



The risk of unfairness to Mexico from inconsistent awards resulting from separate proceedings cannot outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings....<sup>79</sup>

Admittedly, the *Corn Products* tribunal had previously noted that the claimants were willing to accept the risk of inconsistent awards and that such a risk was not significant in the circumstances because the claims appeared to be sufficiently different.<sup>80</sup>

### 3.2 Efficiency: Saving time and costs

It is obvious that consolidation saves time and costs for the party that is involved in all the proceedings being consolidated—in other words, the respondent state in investment arbitration. Indeed, with consolidation, every disputed matter is litigated only once.<sup>81</sup> This applies to the allegations of facts, the production of evidence,<sup>82</sup> and the presentation of legal arguments.

The extent that consolidation benefits investors is debatable. In terms of costs, the investors may share certain expenses, such as expert or legal fees. Such sharing implies, however, that they can agree on a common strategy. In terms of time, consolidated proceedings are bound to last longer than a separate arbitration.

This last consideration leads to the main disadvantage of consolidated proceedings. Even with effective case management, such proceedings are likely to be more time-consuming and cumbersome than each individual proceeding. They may also leave more room for dilatory tactics. Furthermore, parties who seek a decision on certain matters may have to bear increased costs, subject to a well-balanced final allocation, and may have to sit through a long and complex procedure on matters of no interest to them. If only their individual claims were considered, the procedure would be shorter and less expensive.<sup>83</sup> This drawback

---

<sup>79</sup> Order of the Consolidation Tribunal, May 20, 2005, refusing the consolidation of cases in *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5 (hereinafter *Corn Products*), available at <[http://www.worldbank.org/icsid/cases/Corn\\_Archer\\_order\\_en.pdf](http://www.worldbank.org/icsid/cases/Corn_Archer_order_en.pdf)>, at n. 17.

<sup>80</sup> *Id.* n. 16.

<sup>81</sup> Whitesell/Silva-Romero, *supra* note 20, p. 17; M. Platte, When Should an Arbitrator Join Cases?, 18 Arb. Int'l 67 (2002), p. 78.

<sup>82</sup> E. Gaillard, *supra* note 73, p. 38.

<sup>83</sup> *Id.* p. 39; G. A. Born, International Commercial Arbitration (2001), p. 675.

may be alleviated by providing for partial consolidation of only the relevant common issues.

### 3.3 Confidentiality

It is said that consolidation raises issues of confidentiality to the extent that a joined party may have access to protected information, such as business secrets, to which it would not otherwise have been privy. This risk is especially important if the parties joined are competitors.<sup>84</sup>

However, this risk can often be avoided. The proceedings can be structured in such a manner so as to restrict a party's access to information that is not relevant to its own case.<sup>85</sup> Furthermore, measures can be taken to protect privileged information like in any other arbitration.

The issue of confidentiality arose in both the *Corn Products* and the *Softwood Lumber* proceedings. In *Corn Products*, the consolidation tribunal held that the joined parties were competitors and that consolidating the proceedings would imply disclosing their business strategies, production costs and plant designs. It further found that measures to protect this information would make the arbitral process too complex and affect the competition between the parties.<sup>86</sup> By contrast, the subsequent decision of the arbitral tribunal in *Softwood Lumber* reached a different conclusion:

[C]oncerns over confidentiality are, in the view of the Consolidation Tribunal, not relevant when considering a request for consolidation, save for exceptional cases where consolidation would defeat efficiency of process or would infringe the principle of due process....<sup>87</sup>

And further:

It has never been seriously suggested that arbitration cannot proceed in those cases for the mere reason that the parties are competitors and that disclosure of confidential information is purportedly bound to occur.<sup>88</sup>

<sup>84</sup> M. Platte, *supra* note 81, p. 79.

<sup>85</sup> J.C. Chiu, *supra* note 73, p. 60.

<sup>86</sup> *Corn Products*, *supra* note 79, n. 7–9.

<sup>87</sup> *Softwood Lumber*, *supra* note 69, n. 138.

<sup>88</sup> *Id.* n. 141.

The tribunal then found that certain available measures could ensure confidential treatment of information.<sup>89</sup> Hence, confidentiality was not a reason to oppose to consolidation.

### 3.4 Due process and case management

Due process concerns may arise in the sense that an individual party's fundamental procedural rights may not be as well-protected in a collective or mass process than in a bilateral or bipolar one. The risk of due process violations exists with respect to the rights of both parties. The risk exists, on the one hand, for the multiple claimants whose individual case may be buried by a mass of other arguments, which may entail a breach of their opportunity to be heard. The risk exists, on the other hand, for the sole respondent who must fight alone against many, which may give rise to equal treatment concerns.

Adequate case management is expected to prevent these problems. The manner in which to conduct multiparty proceedings is generally left to the tribunal's discretion. As a result, especially high demands are made on the arbitrators' case management know-how. One may ask whether guidelines for streamlining the process could be helpful or whether they would be of no use because the appropriate procedures are too case-specific.

One aspect of due process that cannot be resolved through good case management is the constitution of the arbitral tribunal. As a rule, the parties have an equal right to participate in the formation of the arbitral tribunal. In the event of a consolidation, there are different ways of avoiding such a violation of equal rights.

If a new tribunal is formed to rule on the consolidated case as in the NAFTA, an institution can appoint all its members, such as by the Secretary-General of ICSID under the NAFTA.<sup>90</sup> If no new tribunal is formed but the new case is submitted to an existing tribunal, the rules may provide that the new parties waive their right to appoint the tribunal.<sup>91</sup>

## 4. CONDITIONS OF CONSOLIDATION IN COMMERCIAL AND INVESTMENT ARBITRATION

### 4.1 Connexity

The primary requirement for consolidation is connexity or the existence of a connection between the cases to be consolidated. In legal provisions

<sup>89</sup> *Id.* n. 143.

<sup>90</sup> NAFTA Art. 1126(5).

<sup>91</sup> *E.g.*, Art. 4(1) of the Swiss Rules.

concerning consolidation, the idea of connection is expressed in quite different terms. Some provisions define connexity as implying “questions of law or fact ... in common,”<sup>92</sup> occasionally adding that these common questions “arise out of the same events or circumstances.”<sup>93</sup> Other texts require that there be a risk of conflicting decisions if the matters are handled separately.<sup>94</sup> Still others simply refer to cases concerning the same subject matter on account of the connection between them,<sup>95</sup> without specifying the nature of this connection. Finally, in other cases, there is no mention of any condition of connection,<sup>96</sup> and consolidation is allowed whenever there are reasons that make it desirable.<sup>97</sup>

#### 4.2 Fair and efficient dispute resolution

Under the rules of the NAFTA and certain BITs, the arbitral tribunal deciding on the consolidation must rule “in the interest of fair and efficient resolution of the claims.”<sup>98</sup> In other words, fair and efficient resolution is a necessary condition for consolidation. Similarly, certain national statutes or institutional rules require that the prejudice arising from a failure to consolidate not be outweighed by the risk of undue delay, hardship or prejudice to the rights of parties opposing consolidation.<sup>99</sup>

The previous section discusses some of the factors that must be taken into account when assessing the requirement of fair and efficient resolution of

<sup>92</sup> NAFTA Art. 1126.2; Section 24.1.a of the AIAA; Section 6B of the Hong Kong Arbitration Ordinance (HKAO); Art. 684.12 of the Florida International Arbitration Act (FIAA), establishing the alternative that the disputes arise out of a single transaction or enterprise.

<sup>93</sup> Art. 10.25 of the CAFTA-DR; Art. 33 of the Uruguay-U.S. BIT; Art. 15.24 of the U.S.-Singapore FTA.

<sup>94</sup> Section 10 of the U.S. Uniform Arbitration Act 2001 (UAA) and Art. 28.3 of the Brussels Regulation.

<sup>95</sup> Art. 39 of the Rules of Procedure of the European Free Trade Association Court (EFTA Rules); Art. 43 of the Rules of Procedure of the ECJ (ECJ Rules); Art. 1046 of the NCCP.

<sup>96</sup> Art. 47 of the Rules of the Tribunal for the Law of the Sea (ITLOS Rules); Art. 26 of the Singapore Arbitration Act (SingAA); Section 35 of the EAA; Art. 1297.272 of the California Code of Civil Procedure (CCCP); Section 9 of the IAICA. As a condition for consolidation, Section 21 of the British Columbia Commercial Arbitration Act (BCCAA) requires an agreement of the parties on the appointment of the arbitrators, not a specific agreement to consolidate. Thus, making any agreement on the appointment implies making an agreement to consolidate.

<sup>97</sup> Section 6B.1. lit. c) of the HKAO, allowing consolidation for some reason that makes it desirable to make an order. *See also* Section 2.4 lit.c) of the New Zealand Arbitration Act (NZAA) and Section 24.1 lit. c) of the AIAA.

<sup>98</sup> NAFTA Art. 1126.2; Art. 10.25.6 of the CAFTA-DR; Art. 33.6 of the U.S. Model BIT; Art. 33.6 of the Uruguay-U.S. BIT; Art. 15.24.6 of the Singapore-U.S. FTA; Art. 32 of the Canada Model BIT; Art. G-27.2 of the Canada-Chile FTA; Art. 83.8 of the Japan-Mexico FTA.

<sup>99</sup> Section 10 of the UAA.

the claims. The question to be addressed here is how these factors should be evaluated.

In *Softwood Lumber*, the tribunal stated that these concepts were not relative. Accordingly, the requirement is not that consolidated proceedings be fairer and more efficient than separate proceedings. The requirement is that an order of consolidation be fair and efficient in and of itself.<sup>100</sup>

This same condition also appears in the ALI/UNIDROIT Principles of Transnational Civil Procedure, which add the interests of justice as an alternative.<sup>101</sup> Sometimes this condition is expressed as a desire of the parties for efficiency. Other times, the requirement merely is that an order be desirable without further specification.<sup>102</sup>

### 4.3 Consent of the parties

This requirement is one of the most heavily debated ones. The first question obviously is whether consent is at all necessary. If it is, the question then arises as to its form, and whether it must be expressed or whether it can be implied.

Although consent generally appears to be required, this is not an absolute rule. The Dutch Arbitration Act, for instance, requires no consent. However, it provides the possibility of opting out.<sup>103</sup> Similarly, Section 6B of the Hong Kong Arbitration Act makes no reference to the parties' consent to consolidate, but only to their agreement on the choice of the arbitrators. Lacking an agreement, the Court of First Instance appoints an arbitrator or umpire for the consolidated arbitration proceedings.<sup>104</sup> Thus, a failure to agree on the arbitrator will not rule out consolidation.

On the other hand, certain texts require the express consent of the parties.<sup>105</sup> Section 27 of the International Commercial Arbitration Act of British Columbia (BCICAA), for instance, requires a double consent: first, it requires that the parties to two or more arbitration agreements agree to consolidate; second, it

<sup>100</sup> *Softwood Lumber*, *supra* note 69, n. 121 *et seq.* This interpretation can be transposed to Art. 10.25.6 of the CAFTA-DR; Art. 33.6 of the U.S. Model BIT; Art. 33.6 of the Uruguay-U.S. BIT; Art. 15.24.6 of the Singapore-U.S. FTA; Art. 32 of the Canada Model BIT; Art. G-27.2 of the Canada-Chile FTA; Art. 83.8 of the Japan-Mexico FTA, which have the same wording.

<sup>101</sup> Art. 12.5 of the ALI/UNIDROIT Principles refers to "fair or more efficient management and determination or in the interest of justice."

<sup>102</sup> Section 24.1.c of the AIAA reads:

"It is desirable that an order be made under this section." *See also* Section 6B .1 lit. c) of the HKAO.

<sup>103</sup> Art. 1046.1 of the NCCP.

<sup>104</sup> Section 6B.2 of the HKAO.

<sup>105</sup> Section 35 of the EAA; Art. 26 of the SingAA; Art. 684.12 of the FIAA; Section 21 of the BCCAA.

provides that the Supreme Court may consolidate upon application by one party with the consent of all the other parties.

In the United States, the case law is not uniform. While some federal circuits hold that an express agreement of the parties on consolidation is necessary,<sup>106</sup> others accept an implied agreement to consolidate,<sup>107</sup> and still others consider that the Federal Arbitration Act and the Federal Rules of Civil Procedure authorize court-ordered consolidation even without consent.<sup>108</sup>

In investment arbitration based on a treaty containing a consolidation provision, the consent given to treaty arbitration is deemed to include consent to consolidation. This was stated in *Softwood Lumber*, where the tribunal found that consent to arbitration under Article 1121 of the NAFTA implied consent to Article 1126.<sup>109</sup>

The same applies *mutatis mutandis* to the consent of parties who have submitted to institutional arbitration rules providing for consolidation. Thus, such rules are incorporated into the arbitration agreement and are enforceable.<sup>110</sup>

#### 4.4 Identity of dispute settlement mechanisms

Another difficulty raised by consolidation is the coordination of the different dispute settlement mechanisms applicable to the arbitrations to be joined. There are numerous possible combinations. The larger the differences between the mechanisms, the more difficult it becomes to consolidate:

- The contracts and/or applicable treaties contain the same arbitration clause or refer to the same institutional rules. In such event, there will be no bar to consolidation.

<sup>106</sup> *I.e.*, 2nd, 6th, 7th, 8th, 9th and 11th circuits; *Government of the United Kingdom of Great Britain v. Boeing Co.*, *supra* note 78; *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275–77 (7th Cir. 1995); *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Protective Life Ins. Corp. v. Lincoln National Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989).

<sup>107</sup> *Maxum Founds. v. Salus Corp.*, 817 F.2d 1086 (4th Cir. 1987), *Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Can.*, 210 F.3d 771 (7th Cir. 2000).

<sup>108</sup> *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 1991 WL 90735, at 3 (S.D.N.Y. 1991); *Rio Energy Int'l v. Hilton Oil Transport*, 776 F. Supp. 120 (S.D.N.Y. 1991); *Seguros de Servicios de Salud v. McAuto Systems Group Inc.*, 121 F.R.D. 154 (D.P.R. 1988), reversed by 1989 U.S. App. LEXIS 8863.

<sup>109</sup> *Softwood Lumber*, *supra* note 69, n. 79. The same solution can also be inferred with respect to some BITs that follow the same schema: Art. 33 of the Uruguay-U.S. BIT; Art. 15.24 of the U.S.-Singapore FTA.

<sup>110</sup> I. Ten Cate, *Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under U.S. Law*, 15 *Am. Rev. Int'l Arb.* 133 (2004), p. 153.

- The arbitration clauses are similar, but with the difference that some expressly allow consolidation and others are silent. It then will be necessary to look to the circumstances to decide on consolidation.
- The arbitration clauses are different in that they refer to another seat of the arbitration. This situation may be particularly problematic when the law of one seat permits consolidation and the law of the other does not. It will not arise, however, with ICSID arbitrations, which are isolated in this regard from national laws.
- The arbitration clauses are different or refer to different institutional rules. In this case, it cannot be assumed that there is an advance agreement to consolidate.<sup>111</sup> This lack of agreement can be cured by later consent. If it is not, consolidation generally will be impossible.
- Some contracts provide for arbitration, while others refer the dispute to the courts. This situation is unlikely to occur in the field of investment disputes, since investment treaties contain arbitration clauses (and where they provide for local courts as well, the investor is unlikely to choose such an option for treaty claims).
- The contracts or applicable treaties contain no dispute resolution provisions. It then will be necessary to take all the circumstances into account to decide whether to consolidate.<sup>112</sup>

When it addressed consolidation in the framework of the elaboration of the English Arbitration Act 1996, the Department Advisory Committee (DAC) identified the following conditions, which may provide a further basis for discussions in the present context:

It seems to us realistically impossible to contemplate consolidation of separate arbitration proceedings unless at least the following conditions are satisfied:

- The arbitrations are by agreement to take place in the same country;
- The same law governs the related disputes;
- The same procedural rules govern the related disputes;
- The two tribunals are constituted in the same way.<sup>113</sup>

---

<sup>111</sup> M. Platte, *supra* note 81, p. 72.

<sup>112</sup> B. Hanotiau, *supra* note 74, p. 376.

<sup>113</sup> Department Advisory Committee (DAC), Consolidation: The Second Report of the United Kingdom DAC on Arbitration Law, 7 Arb. Int'l 389 (1991).



#### 4.5 Other conditions: Consultation on consolidation

The conditions reviewed above are the ones most often found in legal texts on consolidation. Some texts, however, set additional conditions. These additional conditions often refer to the consolidation procedure. They include matters such as the obligation to give all the parties and the arbitrators an opportunity to be heard,<sup>114</sup> or the communication of the application to the other tribunals, which, if practicable, must deliberate jointly on the application.<sup>115</sup>

#### 4.6 Discretion to order consolidation

Legislation often provides that, if the conditions for consolidation are met, it is within the tribunal's discretion to order it.<sup>116</sup> In other texts, once the conditions are fulfilled, it is mandatory for the tribunal or the court to consolidate.<sup>117</sup>

In some texts, the position is not clearly articulated or does not fit exactly in either of these categories. A good example can be found in Article 33 of the U.S. Model BIT, which provides for the constitution of a consolidation tribunal unless the request is manifestly unfounded.

### 5. IMPLEMENTATION OF CONSOLIDATION IN COMMERCIAL AND INVESTMENT ARBITRATION

#### 5.1 Legal basis for consolidation

##### 5.1.1 In commercial arbitration

As noted above, the absence of a sufficient legal basis for consolidation is one of the main difficulties encountered by arbitrators and judges faced with a consolidation request. Even if some texts provide such a basis, they often fail to resolve all the procedural difficulties that consolidation may cause. In the face

<sup>114</sup> Art. 1046 of the NCCP. *See also* Art. 4 of the Swiss Rules, ordering the Chambers to consult the parties to all proceedings; NAFTA Art. 1126; Art. 10.25 of the CAFTA-DR; Art. 39 of the EFTA Rules; Art. 43 of the ECJ Rules; Art. 33.6 of the U.S. Model BIT; Art. 33.6 of the Uruguay-U.S. BIT; Art. 15.24.6 of the Singapore-U.S. FTA; Art. 32.2 of the Canada Model BIT; Art. G-27.2 of the Canada-Chile FTA; Art. 83.8 of the Japan-Mexico FTA.

<sup>115</sup> Section 24.5 of the AIAA.

<sup>116</sup> *Softwood Lumber*, *supra* note 69, n. 88 *et seq.* *See also* Art. 39 of the EFTA Rules; Art. 43 of the ECJ Rules; Art. 47 of the ITLOS Rules; Art. 12.5 of the UNIDROIT Principles of Transnational Civil Procedure; Art. 1046 of the NCCP; Art. 3.9 of the Construction Industry Model Arbitration Rules; Art. 7.2 of the GAFTA Form 125 Arbitration Rules; Art. F of the ICANN Uniform Domain Name Dispute Resolution Policy, where the use of verb “may” indicates the discretion of the tribunal.

<sup>117</sup> This seems to be the meaning of Section 9 of the IAICA; Art. 26 of the SingAA; and Section 35 of the EAA.



of such procedural uncertainties, it is not surprising that arbitrators and courts are reluctant to consolidate.

In commercial arbitration, statutory provisions are one possible basis for consolidation. A few national legislations provide such a basis. They either treat consolidation very briefly,<sup>118</sup> perhaps in the hope that this will discourage the application of the relevant provisions, or on the contrary are very detailed.<sup>119</sup>

Consolidation can also be arrived at by the operation of institutional arbitration rules—in other words, by agreement of the parties who deal with consolidation by incorporating the institutional rules into their contract and through the involvement of an arbitration institution. However, arbitration rules that provide for consolidation, for instance the Swiss Rules of International Arbitration, are the exception.

*Ad hoc* arbitration is the tool of choice for consolidation, if the parties agree on the procedures and conditions for consolidation and empower the courts or tribunals to consolidate. Ideally, the provisions for consolidation should be included in the arbitral agreement,<sup>120</sup> and should specify the method for appointing the arbitrators.

### 5.1.2 In investment arbitration

A basis for consolidation exists in certain treaties, especially recent free trade agreements and BITs. The NAFTA is a prime example of such a treaty.<sup>121</sup>

By contrast, the ICSID Convention and the ICSID Arbitration Rules are silent on consolidation. Failing an express provision, it is untenable to argue that the institution or the arbitration tribunal has the power to consolidate separate arbitrations. Thus, the question arises of how to introduce a basis for consolidation in ICSID arbitration.

As all the contracting states must ratify any amendment to the ICSID Convention,<sup>122</sup> a revision of the Convention cannot be the solution. Looking at the ICSID reform proposals in connection with the introduction of an appeals facility,<sup>123</sup> one may envisage special rules on a consolidation facility. States could

<sup>118</sup> Section 35 of the EAA; Art. 26 of the SingAA; Art. 1297.272 of the CCCP.

<sup>119</sup> In particular, Art. 1046 of the NCCP.

<sup>120</sup> J. C. Chiu, *supra* note 73, p. 70.

<sup>121</sup> NAFTA Art. 1126; Art. 10.25 of the CAFTA-DR; Art. 33 of the Uruguay-U.S. BIT; Art. 15.24 of the U.S.-Singapore FTA; Art. 10.24 of the Chile-U.S. FTA; Art. 10.24 of the Morocco-U.S. FTA.

<sup>122</sup> Art. 66 of the ICSID Convention.

<sup>123</sup> ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, *supra* note 54.

then opt into such a facility by way of provisions inserted in investment laws and treaties.

The ICC administers a fairly significant number of arbitrations that are investment arbitrations in substance, or arbitrations based on an arbitration clause embodied in an investment contract between a private party and a state. The existing ICC Rules on multiparty arbitrations are insufficient to deal with the consolidation of arbitrations arising out of the same state measure or event. An amendment of the arbitration rules would be necessary to allow for such a consolidation. In considering such an amendment, one should obviously ask whether the inclusion of a consolidation provision, although undoubtedly beneficial for investment arbitrations, would not deter commercial operators from resorting to ICC arbitration for their commercial disputes. If this were the case, then the consolidation mechanism should be part of a separate set of rules and not be incorporated in the arbitration rules.

A number of investment treaties provide the investor with an option to choose either ICSID, or ICC or UNCITRAL arbitration. The UNCITRAL Arbitration Rules do not allow consolidation. UNCITRAL may put the revision of the UNCITRAL Arbitration Rules on the agenda of the Working Group II on Arbitration. If this is done, which is likely, then the revision could include the incorporation of rules on consolidation.<sup>124</sup>

An additional question arises in connection with the basis for consolidation in investment arbitration: how to implement consolidation across institutions and rules, or in other words consolidation of arbitrations brought under different institutional rules, or even under the same rules but with different arbitration seats and thus different *leges arbitri*.<sup>125</sup> Obvious examples are the *CME* and *Lauder* cases, one, an UNCITRAL arbitration in London,<sup>126</sup> and the other, an UNCITRAL arbitration in Stockholm.<sup>127</sup>

A further question that needs to be explored is whether consolidation may merge treaty and contract claims and, thus, do away with this distinction. This

<sup>124</sup> Incidentally, in view of the increasing use of the UNCITRAL Arbitration Rules for investment arbitrations, the revision is also likely to focus on other matters specific to investment arbitrations, among which first and foremost transparency.

<sup>125</sup> This question refers to the identity of the dispute resolution mechanism discussed in Section 4.4 above.

<sup>126</sup> *Lauder v. Czech Republic*, Final Award, Sept. 3, 2001, available at <<http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf>>, last visited June 30, 2006.

<sup>127</sup> *CME Czech Republic B.V. v. Czech Republic*, Final Award, Mar. 14, 2003, available at <<http://www.investmentclaims.com/decisions/CME-Czech-FinalAward-14Mar2003.pdf>>, last visited June 30, 2006.

is the case under the U.S. Model BIT but apparently not under the Canadian Model BIT.<sup>128</sup> Subject to the wording of any applicable treaty, the consolidation of claims arising out of the same state measure would appear to cover both treaty and contract claims, as they both arise out of the same measure or event, although the basis for liability or responsibility is different (contract versus treaty).

### 5.1.3 Especially, general powers of the arbitral tribunal to conduct the proceedings

Most national laws and institutional rules allow arbitrators to conduct arbitration in the manner they consider appropriate. This freedom usually is limited by the obligation to treat the parties fairly, respecting their equality and their right to be heard, and can likewise be limited by the parties' agreement on the conduct of the proceedings.<sup>129</sup>

This might provide a basis for consolidation. So for instance, in one of the *Pertamina* decisions,<sup>130</sup> the Court of Appeal of the Fifth Circuit held:

[C]ourts and arbitration tribunals have recognized that claims arising under integrated contracts may be consolidated into single arbitrations. The [arbitral] Tribunal cited one other factor that supported consolidation: "appropriateness." The parties agreed to the application of the UNCITRAL Rules, which permit a tribunal to conduct arbitration 'in such manner as it considers appropriate.'

In practice, however, it is very unlikely that, in the absence of an agreement between the parties, a tribunal would agree to consolidate, relying only on its general powers to conduct the proceedings.

<sup>128</sup> A. Crivellaro, *supra* note 5, p. 409.

<sup>129</sup> See Art. 38 of the Arbitration Rules of the World Intellectual Property Organisation (WIPO Rules); Art. 15 of the Swiss Rules; Art. 14 of the LCIA Rules; Art. 15 of the ICC Rules; Art. 16 of the AAA International Arbitration Rules; Art. 15 of the UNCITRAL Arbitration Rules; Art. 19 UNCITRAL Model Law (ML); Section 33 of the EAA; Art. 182 of the Swiss Private International Law Act (PILA); Section 15 of the UAA; Art. 1042 of the German Arbitration Act (GAA).

<sup>130</sup> *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).

## 5.2 Who orders consolidation?

### 5.2.1 In commercial arbitration

Consolidation can be ordered by the courts, the arbitrators or the arbitral institution chosen by the parties.<sup>131</sup> The most widespread option is for consolidation to be ordered by the state courts.<sup>132</sup> Depending on the relevant statutes and rules, consolidation may be granted by the courts either with or without the parties' consent.<sup>133</sup> In rare cases, the power of the courts is absolute and exists even if the parties have agreed to rule out court-ordered consolidation.<sup>134</sup>

A number of objections have been raised against court-ordered consolidation. One of the main objections is the fact that court-ordered consolidation is limited to arbitral proceedings held in the country of the court ruling on consolidation.<sup>135</sup> This objection finds support in the Dutch Arbitration Act, which limits consolidation to proceedings commenced in the Netherlands.

In institutional arbitration, the institution may have the power to consolidate, the parties giving their consent to consolidation by submitting to the institution's rules.<sup>136</sup> The power to consolidate may also be vested in the arbitrators, either because the parties expressly confer such power to the arbitral tribunal,<sup>137</sup> or by operation of law.<sup>138</sup> Where both courts and arbitrators have the power to consolidate, the issue arises of whether these powers are concurrent or whether one prevails.<sup>139</sup>

<sup>131</sup> See Art. 12 of the CEPANI Rules empowering the Chairman and the Appointments Committee; Art. 4 of the Swiss Rules. Similarly, although it is not an arbitral institution, Art. 1126 of the EFTA Rules; Art. 10.25 of the CAFTA-DR; Art. 33 of the U.S. BIT Model; Art. 33 of the Uruguay-U.S. BIT; Art. 15.24 of the U.S.-Singapore FTA, referring to the power of the Secretary-General. However, it is not the Secretary-General but the tribunal established by him who will decide on the assumption of its jurisdiction to consolidate.

<sup>132</sup> Section 27.2. of the BCICAA; Art. 7 of the Ontario International Commercial Arbitration Act (OICAA); Section 6B HKAO.

<sup>133</sup> Art. 1046 of the NCCP. The parties can also agree to refuse such power to the courts (*see* Born, *supra* note 83, p. 678).

<sup>134</sup> Chap. 251, Art. 2A of the Massachusetts General Law (MGL). See Section 10 of the UAA, however, which states that the prohibition agreed by the parties must be respected.

<sup>135</sup> Intervention of B. Oppetit, in J. L. Devolvé, *L'arbitrage et les tiers: III.—Le droit de l'arbitrage*, 3 Rev. Arb. 501 (1988), pp. 554 *et seq.*

<sup>136</sup> *E.g.*, Art. 4(1) of the Swiss Rules.

<sup>137</sup> Section 35 of the EAA.

<sup>138</sup> Particularly interesting is Section 24 of the IAA, whereby the tribunal that received the application communicates it to the other tribunal(s) and the tribunal(s) jointly make(s) the order.

<sup>139</sup> See Section 21 of the BCCAA. Section 35 EAA is an interesting clause because it allows the parties to agree on the principle of consolidation. If the parties intend the arbitrators to rule on consolidation, they need to confer such power to the arbitral tribunal. Otherwise, only the courts will be empowered to consolidate. See also Art. 26 of the SingAA; and Section 9 of the IAICA.

## 5.2.2 In investment arbitration

As previously mentioned, most investment treaties provide for a two-step procedure to order the consolidation of proceedings.

First, the party requesting consolidation addresses its request to a third person, the ICSID Secretary-General,<sup>140</sup> or another person within the relevant institution.<sup>141</sup> This person's powers are limited. Some texts, such as the NAFTA, the Canada-Chile Free Trade Agreement (FTA), the Japan-Mexico FTA, the Canadian Model BIT, require such a person to establish a tribunal whatever the circumstances. By contrast, under the CAFTA-DR, the U.S. Model BIT, the Uruguay-U.S. BIT, the U.S.-Singapore FTA, the U.S.-Morocco FTA, and the Chile-U.S. FTA, a tribunal is established only if the request is not manifestly unfounded.

Second, the arbitral tribunal so established decides if it assumes jurisdiction on all or part of the claims subject to consolidation, or if it instructs a tribunal previously constituted to assume jurisdiction over, hear and determine together all or part of the claims.<sup>142</sup>

## 5.3 Who resolves the consolidated cases?

### 5.3.1 In commercial arbitration

The solutions differ. Often the resolution of the consolidated disputes is entrusted to a new tribunal. This is the case under Article 1046 of the Netherlands Arbitration Act and Article 24 of the Australian International Arbitration Act.<sup>143</sup> In other texts, the question is left to the discretion of the court.<sup>144</sup>

Whatever the contents of the applicable rule, it appears that a different agreement of the parties would prevail,<sup>145</sup> for instance if they wished to submit

<sup>140</sup> NAFTA Art. 1126.3; Art. 10.25.2 of the CAFTA-DR; Art. 15.24.2 of the U.S.-Singapore FTA; Art. 33.3 of the Uruguay-U.S. BIT; Art. 10.24.2 of the U.S.-Morocco FTA; Art. 10.24.2 of the Chile-U.S. FTA; Art. G.27.3 of the Canada-Chile FTA; Art. 83.2 of the Japan-Mexico FTA. See also *Softwood Lumber*, *supra* note 69, n. 156, stating that the single tribunals cease to function.

<sup>141</sup> Art. 12.2 Annex A of the Model International Agreement on Investment for Sustainable Development of the International Institute for Sustainable Development (hereinafter *IISD Model*) refers to the "Director."

<sup>142</sup> Art. 10.25.6 of the CAFTA-DR; Art. 33.6 of the U.S. Model BIT; Art. 33.6 of the Uruguay-U.S. BIT; Art. 15.24 of the U.S.-Singapore FTA; Art. 10.23.6 of the U.S.-Morocco FTA; Art. 10.20.6 of the Chile-U.S. FTA. On the contrary, Art. 1126.2 NAFTA; Art. 32 of the Canada Model BIT; and Art. 83.2 of the Japan-Mexico FTA do not provide for the possibility to instruct a tribunal already constituted to assume jurisdiction.

<sup>143</sup> See also Section 2 of the NZAA; and Section 27 of the BCICAA; and Section 21 of the BCCAA.

<sup>144</sup> See Art. 684.12 of the FIAA; and Art. 7 of the OICAA. Very recently, the U.S. Court of Appeals for the Seventh Circuit held that consolidation was a procedural issue for the arbitrators, not the court, to decide (*Employers Ins. Co. of Wausau v. Century Indemnity Co.* 443 F 3d 537, 577 (7 th Cir. 2006)).

<sup>145</sup> Section 27.2 of the BCICAA; Section 21 of the BCCAA; Section 9 of the IAICA; Section of the 24.8 AIAA.

the consolidated case to one of the tribunals initially seized of part of the dispute.

### 5.3.2 In investment arbitration

As mentioned above, some FTAs and BITs provide for the creation of a new arbitral tribunal when there is a request for consolidation. In these cases, and provided that the new arbitral tribunal assumes jurisdiction, it will be this arbitral tribunal that will hear the consolidated claims.

In the event that the new tribunal assumes jurisdiction over all the claims, the initial tribunals will lose their powers to decide on the claims submitted to them.<sup>146</sup> If the consolidation is only partial, they will be empowered to decide those claims over which the new tribunal did not assume jurisdiction.

For the sake of coordination during the consolidation process, the treaties provide that the consolidation tribunal may order a stay of the individual arbitrations pending its decision.<sup>147</sup> In other words, the tribunal that decides whether to consolidate or not also rules on the consolidation disputes. It has been argued that such a tribunal would be biased in favor of consolidation because its decision might be influenced by a financial incentive.<sup>148</sup> As a result, it has been suggested that either the institution should rule on the consolidation or that a new tribunal should take over if the consolidation is ordered. In such events, the mission of the consolidation tribunal would be limited to deciding whether to consolidate.

Neither suggestion appears satisfactory. First, the issue of consolidation is too complex to be the subject of an administrative decision by the institution. It needs to be briefed by both parties involved, at least in writing, and possibly also orally, on the occasion of a hearing on consolidation.

Second, the formation of an additional tribunal—additional to the consolidation tribunal and to the tribunals initially seized of the different disputes, which would be the fourth tribunal, at least—appears cumbersome and time-consuming, and can provide an opportunity for dilatory tactics. The position of an arbitral tribunal, having to decide whether it will “keep” the case or not, is not unusual. Every tribunal that rules on its own

<sup>146</sup> NAFTA Art. 1126.8; Art. 10.25.9 of the CAFTA-DR; Art. 15.24.9 of the U.S.-Singapore FTA; Art. 33.9 of the Uruguay-U.S. FTA; Art. 10.24.9 of the U.S.-Morocco FTA; Art. 10.24.9 of the Chile-U.S. FTA; Art. G.27.8 of the Canada-Chile FTA; Art. 83.9 of the Japan-Mexico FTA.

<sup>147</sup> NAFTA Art. 1126.9; Art. 10.25.10 of the CAFTA-DR; Art. 15.24.10 of the U.S.-Singapore FTA; Art. 33.10 of the Uruguay-U.S. FTA; Art. 10.24.10 of the U.S.-Morocco FTA; Art. 10.24.10 of the Chile-U.S. FTA; Art. G.27.9 of the Canada-Chile FTA; Art. 83.7 of the Japan-Mexico FTA.

<sup>148</sup> In the course of colloquium discussions as well as in the *Softwood Lumber* proceedings. *Softwood Lumber supra* note 69, n. 82.

jurisdiction finds itself in this position, and no one calls for abolishing the principle of *Kompetenz-Kompetenz*. Professionalism and ethics should bring about an objective, bias-free assessment. In the words of the *Softwood Lumber* consolidation tribunal:

With respect to the alleged incentive for members of an Article 1126 Tribunal, that situation is not uncommon in arbitration. Indeed, any arbitral tribunal that is faced with an objection to its jurisdiction would have the purported conflict.<sup>149</sup>

And further:

The perceived ethical conflict would apply to many professionals. To take two examples: a lawyer is to advise his or her client to bring a legal action; or a surgeon is to advise his or her patient about heart surgery. The lawyer is to advise his or her client about the strengths and weaknesses of the case and the chances of success; the surgeon is to advise the patient about the condition of the heart and the chances of success of the surgery. That is what the deontology of these professionals requires them to do. This situation basically is not any different for an arbitrator. He or she is to analyze the claims, and the factual and legal arguments in support thereof, and to make a determination in a professional, impartial and independent manner.<sup>150</sup>

## 5.4 Other practicalities of consolidation

Whatever the basis and whoever decides on consolidation, the relevant rules text and the consolidation decision should provide for a number of practicalities of consolidation.

### 5.4.1 Total or partial consolidation

First, it should be decided whether the consolidation is to be total or partial. Certain texts expressly allow for partial consolidation,<sup>151</sup> while others remain silent in this respect.<sup>152</sup> Do the latter implicitly refer to total consolidation only

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at n. 84.

<sup>151</sup> Art. 1046 of the NCCP; NAFTA Art. 1126.2; Art. 10.25.6 of the CAFTA-DR; Art. 33.6 of the U.S. Model BIT; Art. 33.6 of the Uruguay-U.S. BIT; Art. 33.6 of the U.S.-Singapore FTA; Art. 32.2 of the Canada Model BIT; Art. 32.2 of the Canada-Chile FTA; Art. 83.8 of the Japan-Mexico FTA; Art. 1046 of the NCCP; Section 10 of the UAA.

<sup>152</sup> Section 24 of the AIAA; Section 9 of the IAICA; Art. 684.12 of the FIAA.



or is partial consolidation also available in such instances? The second answer appears the better by way of application of the principle *qui peut le plus, peut le moins*.<sup>153</sup>

Assuming partial consolidation is available, the question arises whether and when partial or total consolidation should prevail. Generally speaking, it appears reasonable to argue that total consolidation should prevail over partial consolidation. The reason is that partial consolidation does not serve procedural efficiency as well as total consolidation, since, with partial consolidation, different proceedings continue to run in parallel even after the consolidation.

It should be noted that partial and total consolidation are not mutually exclusive. They can be combined, for example, when two claimants have identical claims against the respondent and a third claimant shares some of the claims of the first two and has some others of his own. The first two cases can then be the subject of total consolidation, and the third of partial consolidation.

#### 5.4.2 When to consolidate

Another question is when to consolidate. It must be answered bearing in mind that the primary purpose of consolidation is efficiency, and time is a key to efficiency. To protect efficiency, should there be time limits prior to and after which no request for consolidation will be allowed? Because there are many different case configurations, it is difficult to set hard and fast rules that can apply in all possible circumstances. Nevertheless, a number of considerations can be made:

- Because of the variety of situations, the arbitral tribunal should have the discretion to deny any untimely request.
- Generally, a request for consolidation should be made “at the earliest convenient moment: in that way, unnecessary expense and effort can be saved from the outset.”<sup>154</sup>
- A request for consolidation filed before the relevant issues can be sufficiently identified is untimely and should be denied. This was the test used in *Shui On*, where the court held that, although the pleadings were not completed, the relevant issues had been sufficiently identified.<sup>155</sup>

<sup>153</sup> See also A. Crivellaro, *supra* note 5, p. 402.

<sup>154</sup> Re Shui On Construction Ltd and Schindler Lifts, *supra* note 42, pp. 219 *et seq.*

<sup>155</sup> *Id.*



- The level of progress of each case is another relevant factor. The further apart they are, the less likely it is that consolidation will produce efficient results.<sup>156</sup>
- Whenever a jurisdictional objection is pending in one case but not in the others, proceedings should not be consolidated.<sup>157</sup> The position obviously is different if the jurisdictional objection is common to all cases.<sup>158</sup>
- A request for consolidation filed after the time when the tribunal has closed the proceedings should be deemed untimely, and denied. Otherwise, this may allow last minute maneuvers to delay the issuance of the decision on jurisdiction.
- A request filed after the tribunal has rendered a partial award that carries *res judicata* is untimely when the partial award resolves the common issues.

### 5.4.3 How to conduct the consolidated proceedings

Furthermore, it will be necessary to determine how the consolidated proceedings will be conducted. In *Softwood Lumber*, the tribunal decided that it had discretion to determine the conduct and sequence of the consolidated proceedings. Obviously, this discretionary power will be exercised in consultation with the parties.<sup>159</sup>

In this context, a specific issue arises when the consolidated cases are not all at the same level of progress. In such an event, some of the cases may have to be briefed separately, while the others are stayed until the former “catch up.” Again, these are matters for which no hard and fast rule can be set, and which fall within the arbitral tribunal’s discretion.

### 5.4.4 The nature of the decision to consolidate

The nature of the decision to consolidate determines primarily whether the decision can be challenged in courts. It also determines whether the decision can

<sup>156</sup> Art. 4 of the Swiss Rules reads:

When rendering its decision, the Chambers shall take into account all circumstances, including the links between the two cases, and the progress already made in the existing proceedings.

Article 7 of the Arbitration Rules of the Mexico Arbitration Centre reads:

[...] the parties may request the Secretary-General to join the proceedings, provided that the Terms of Reference have not yet been signed by the parties or approved by the General Council in neither of the matters.

<sup>157</sup> It must be noted that, in *Softwood Lumber*, jurisdictional objections were pending and Terminal had not filed its statement of claim.

<sup>158</sup> See Art. 21.3 of the UNCITRAL Arbitration Rules, which reads as follows:

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim.

<sup>159</sup> *Softwood Lumber*, *supra* note 69, n. 153 *in fine*.

be enforced judicially and whether it binds the arbitral tribunal that rendered it. If the decision is an award, it may be challenged: if it is a procedural order, it generally will not be subject to challenge (except possibly together with the final award).

There is no universally accepted definition of an award.<sup>160</sup> Consequently, there is no general agreement either on the distinction between a procedural order and an award.<sup>161</sup> The New York Convention contains no helpful definition of an award,<sup>162</sup> nor does the UNCITRAL Model Law. The Working Group drafting the Model Law actually had proposed a definition:

“Award” means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.<sup>163</sup>

However, the Working Group rejected this proposal because disagreement arose as to whether decisions on procedural issues were to be considered awards.<sup>164</sup> For present purposes, we suggest using a more nuanced definition, pursuant to which an award is a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural request which seeks to end the proceedings.<sup>165</sup> In other words, decisions dealing with a procedural matter, for example, a *res judicata* defense, are awards whenever they put an end to the proceedings or whenever they would have done so, but for the denial of the procedural request or defense.

By contrast, procedural orders are decisions intended to organize the procedure. They are based solely on the tribunal’s powers to conduct the

<sup>160</sup> Redfern/Hunter, *Law and Practice of International Commercial Arbitration*, (2004), p. 353; Lew/Mistelis/Kröll, *Comparative International Commercial Law*, (2003), p. 628.

<sup>161</sup> Redfern/Hunter, *supra* note 160, pp. 354–356; Poudret/Besson, *Droit comparé de l’arbitrage international* (2002), pp. 676–683, both with discussion of cases.

<sup>162</sup> Art. I.2 NYC reads as follows: “The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”

<sup>163</sup> A. Broches, *Recourse Against the Award; Enforcement of the Award*, UNCITRAL’s project for Model Law on International Commercial Arbitration, ICCA Congress Series No. 2 (1984), p. 208. A/CN.9/246, § 192.

<sup>164</sup> A/CN.9/246, para. 192 *et seq.*

<sup>165</sup> Poudret/Besson, *supra* note 161, pp. 678 *et seq.* with citations to cases; *see also* Fouchard/Gaillard/Goldmann, *On International Commercial Arbitration* (1999), para. 1353.

arbitration proceedings.<sup>166</sup> In other terms, what ultimately matters is the function of the decision.<sup>167</sup>

This being so, it obviously is the law governing the arbitration that will determine whether a decision is an award or a procedural order. Thus, one should be aware that such law may show variations from the general definitions just set out.

On the basis of these general definitions and of the developments on consolidation made earlier, let us now determine the nature of the decision to consolidate. Doing so, the following points can be made:

- First, a distinction must be made based on the author of the decision. If it is an arbitral institution, the decision necessarily will be administrative in nature. Only if the decision is made by an arbitral tribunal does the question arise whether it is an award or a procedural order.
- Further, one should note that the treaties dealing with consolidation use the term “consolidation order.”<sup>168</sup> Acting under the NAFTA, the *Softwood Lumber* tribunal characterized consolidation as an “action of a procedurally administrative nature, in which two or more arbitral tribunals are replaced by one arbitral tribunal with respect to the same disputes.”<sup>169</sup>
- Moreover, bearing in mind the definition of the term “award” adopted above, it goes without saying that the decision to consolidate is not a decision on the merits. It is not a decision on jurisdiction either. Its purpose is not to decide on the validity and scope of the arbitration agreement.<sup>170</sup>

<sup>166</sup> K-P. Berger, *International Economic Arbitration* (1993), p. 592; Lew/Mistelis/Kröll, *supra* note 160, para. 24–5; Redfern/Hunter, *supra* note 160, p. 354. ICSID Arbitration Rule 20 provides for a non-exhaustive list of procedural matters. Procedural decisions may be modified since they carry no *res judicata* effect and do not bind the arbitrators. S. Jarvin, *To What Extent Are Procedural Decisions of Arbitrators Subject to Court Review?*, 9 ICCA Congress series 366 (1999), p. 368; R. Trittman, *When Should Arbitrators Issue Interim or Partial Awards and or Procedural Orders?*, 20 J. Int'l Arb. 255 (2003), p. 260; Poudret/Besson, *supra* note 161, para. 542.

<sup>167</sup> Lew/Mistelis/Kröll, *supra* note 160, para. 24–12.

<sup>168</sup> See NAFTA Art. 1126.2; Art. 33.1 of the U.S. Model BIT; Art. 10.25 of the CAFTA-DR; Art. 83.1 of the Japan-Mexico FTA; Art. 33 of the Uruguay-U.S. Model BIT; Art. 15.24 of the U.S.-Singapore FTA; Art. 32 of the Canada Model BIT; Art. G-27.2 of the Canada-Chile FTA; Section 6b.1lit. c of the HKAO.

<sup>169</sup> *Softwood Lumber*, *supra* note 69, n. 100.

<sup>170</sup> So, for instance, “the question of consolidation does not affect an analysis of the validity or scope of this arbitration.” *Blimpie Int'l, Inc. v. Blimpie of the Keys*, 371 F. Supp. 2d 469 (D.N.Y. 2005). See also *Shaw's Supermarkets Inc. v. United Food & Commer. Workers Union, Local 791*, 321 F.3d 251 (1st Cir. 2003).

That latter decision is made either before or after the consolidation by the tribunal(s) then in charge.<sup>171</sup> The fact that Article 1126(2) of the NAFTA uses the words “assume jurisdiction” is no indication to the contrary. Such language simply is meant to say “that the Article 1126 [consolidation] Tribunal takes over the proceedings, in the capacity of an arbitral tribunal, to hear and determine the disputes from the respective Article 1120 [initial] Tribunals.”<sup>172</sup>

- As an additional possible classification, one may ask whether the decision to consolidate is a decision on the regularity or validity of the constitution of the arbitral tribunal. Under certain legal regimes, such decisions are awards subject to challenge.<sup>173</sup> This classification would not reflect the true nature of the decision to consolidate. When determining whether to consolidate or not, the tribunal does not review the constitution of the earlier tribunals. It relies on very different considerations involving efficiency, commonality and due process.
- Still bearing in mind the definition of an award given earlier, the decision on consolidation does not put an end to the proceedings and is not capable of doing so. If it dismisses the request, the proceedings continue separately. If it grants the request, the proceedings continue jointly. In other terms, they continue in any event.
- As a result, one cannot but conclude that the decision to consolidate is an order not subject to challenge. This conclusion is in line with a number of U.S. court decisions.<sup>174</sup>

Because of the significant consequences it may have on the proceedings, the consolidation decision should be subject to certain safeguards. It should be taken by the tribunal as a whole by a majority vote,<sup>175</sup> not by the president of the tribunal only, as is sometimes done for procedural orders. Equally, decisions on consolidation should be reasoned, unlike certain procedural orders. Finally,

<sup>171</sup> *Softwood Lumber*, *supra* note 69, n. 101.

<sup>172</sup> *Id.*

<sup>173</sup> *E.g.*, for Switzerland, Art. 190 para. 2 lit. a of the PILA; Berti/Schnyder, Article 190, in S. Berti (ed.), *International Arbitration in Switzerland* (2000), p. 575; *see also* Lew/Mistelis/Kröll, *supra* note 160, paras. 25–35. *See* Art. 1502 of the NCPC; Section 67 of the EAA.

<sup>174</sup> *See* decisions cited in note 170.

<sup>175</sup> This idea is supported by F. Poudret and S. Besson, who consider that when there is no mention of the *lex arbitri* or the agreement of the parties, an arbitral tribunal shall decide on procedural issues by majority. Poudret/Besson, *supra* note 161, para. 543.

unless the rules or the parties provide otherwise, orders on consolidation cannot be modified.<sup>176</sup>

#### 5.4.5 “Deconsolidation” and miscellaneous other matters

If after consolidation has been ordered, the consolidated proceedings turn out to be inefficient or inappropriate under the circumstances, should there be a possibility to undo the consolidation, or rather to “deconsolidate”? Subject to some exceptions,<sup>177</sup> the current texts on consolidation do not provide for such a possibility. If the consolidation is briefed and decided properly, potential inefficiencies should be identified at the time of the decision on consolidation, and not discovered later. As a result, a situation where deconsolidation is warranted appears rather theoretical. If a provision on deconsolidation is, nevertheless, deemed useful, it should be designed in such a fashion that it does not open the door to dilatory tactics.

Finally, for the sake of completeness, it should also be determined whether the consolidated tribunal must render several separate awards or a single consolidated award, and whether all parties must participate in annulment proceedings if only one party files an action for the annulment of a consolidated award.

## 6. CONSOLIDATION IN THE PRACTICE OF OTHER DISPUTE SETTLEMENT MECHANISMS

Consolidation is also part of the practice of other dispute settlement mechanisms. Such is the case of the International Court of Justice, the International Tribunal for the Law of the Sea, and the Dispute Settlement Body of the World Trade Organization. The three are inter-state dispute settlement bodies.<sup>178</sup> They will be examined in turn.

<sup>176</sup> *Softwood Lumber*, Procedural Order No. 2, Jan. 10, 2006: “The Consolidation Order does not have the same legal status and effect as a procedural order referred to in Section 20 of Procedural Order No. 1, which can be varied if circumstances so require...” It must be pointed out that on Feb. 17, 2006, Tembec filed a motion to vacate the decision on consolidation as an award, <<http://www.state.gov/s/l/c17639.htm>>, last visited July 17, 2006.

<sup>177</sup> Art. 7.7 of the Arbitration Rules (2000 Edition) of the Chartered Institute of Arbitrators and Rule 3.11 of the Construction Industry Model Arbitration Rules are exceptions allowing the tribunal to revoke the consolidation order. See also Art. 12.5 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, allowing separation of claims for fair and efficient management.

<sup>178</sup> One has to note that the Seabed Disputes Chamber of the ITLOS also has jurisdiction with respect to disputes between the International Seabed Authority and a prospective contractor, and disputes between a State and the International Seabed Authority.

## 6.1 The International Court of Justice

Joinder or consolidation of disputes was not mentioned in the Rules of the Permanent Court of International Justice (PCIJ) until 1936.<sup>179</sup> The ICJ drafted its Rules (Rules of Court) in 1946, the year it was established. The 1946 Rules of Court were mostly inspired by the PCIJ's Rules of 1936.<sup>180</sup> In 1978, a revision of the Rules of Court resulted in the incorporation of a new provision, Article 47, which deals specifically with consolidation of cases and procedures, or rather the authority for the ICJ to convert multiple and separate proceedings into a single proceeding. The effect of Article 47 is that single pleadings are filed subsequently, leading to a single judgment. Article 47 of the Rules of Court constitutes a codification of the practice developed by both the PCIJ and the ICJ with regard to consolidation.<sup>181</sup>

### 6.1.1 Practice of the PCIJ and the ICJ with regard to consolidation

At the PCIJ, consolidation was promoted on the one hand based on the will of the parties to a dispute and, on the other hand, *proprio motu* and *ex officio* by the Court itself in exercising its *compétence de la compétence*. An example of the first situation is an agreement between the parties to join, for the purpose of proceedings on the merits, two actions initiated successively by one party

<sup>179</sup> From 1936, joinder was foreseen in the Rules of the PCIJ as what we may call “joinder of incidental proceedings to the proceedings *per se* before the Court.” Only two mechanisms of consolidation were foreseen. Article 62 of the Rules opened the way to the joinder of preliminary objections to the merits, and Article 63 provided for the joinder to the original proceedings of a case instituted by counter-claim. According to Rosenne, these types of joinder constitute “two specific types of joinder,” see Sh. Rosenne, *The Law and Practice of the International Court* (1985), p. 551. For a discussion on the notion of “joinder of preliminary objection to the merits,” see Sir G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. II, (1986), pp. 782 *et seq.*

<sup>180</sup> In 1972, the ICJ amended its Rules and the first possibility—joinder of preliminary objections to the merits—was dropped while the second—joinder of counter-claims to original proceedings—was retained in what is Article 80 of the Rules of Court. The latter was amended in 2001. Paragraph 3 of Article 80 covers the same ground as former paragraph 3, but is worded differently and omits the provision that the Court shall “decide whether or not the question thus presented shall be joined to the original proceedings,” and replaces it with the more general clause that the Court “shall take its decision thereon.” This amendment reveals the fact that joinder of incidental proceedings to the proceedings *per se* before the Court no longer constitutes a main feature and characteristic of consolidation in the Rules of Court.

<sup>181</sup> According to Rosenne, “The common feature of the instances of joinder so far encountered is that the separate proceedings all dealt with the same general situation and had so much in common that their continuation as separate cases would have been inconvenient and otiose.” See Sh. Rosenne, *The Law and Practice of the International Court 1920–1996*, vol. III (1997), p. 1256.

against another party.<sup>182</sup> The said agreement does not need to be formal and explicit; it can be presumed, as was the case in the *South-Eastern Greenland* case.<sup>183</sup>

Illustrations of such a presumed agreement include a situation in which each party had filed an application instituting proceedings against the other on the same day regarding the same matter,<sup>184</sup> and one in which preliminary objections to two separate applications filed by a state have been joined by the Court.<sup>185</sup>

The ICJ has also dealt with other types of circumstances, such as several parties instituting proceedings against a single state arising out of the same or similar facts,<sup>186</sup> or one party filing a claim against more than one state arising out of a single set of facts.<sup>187</sup> In practice, the issue of the joinder or consolidation of cases has often arisen in connection with the appointment of judges *ad hoc*.<sup>188</sup>

<sup>182</sup> See Case concerning Certain German Interests in Polish Upper Silesia, Judgment of Feb. 5, 1925, PCIJ Ser. A, No.7 (1926), p. 6: "In the additional Application filed on the same day on behalf of the German Government, the latter [...] requested the Court to join that Application to the Application filed on May 15th, 1925. By a decision dated February 5th, 1926, the Court complied with this request" See also *id.* "Decision concerning the Joinder of the Two Suits Introduced Successively by the German Government," Annex I, p. 94: "The Court [...] duly records the agreement reached between the Parties in regard to the joinder of the proceedings instituted by the German Government against the Polish Government on May 15th and August 25th, 1925."

<sup>183</sup> See Legal Status of the South-Eastern Greenland, PCIJ Ser. A/B, No. 48 (1932), p. 270: [...] Whereas the situation in which the Court has to deal *closely approximates, so far as concerns the procedure, to that which would arise if a special agreement had been submitted to it by the two Governments*, parties to the dispute, indicating the subject of the dispute and the differing claims of the Parties; Whereas, in any case, the two applications should be joined and the two applicant Governments held to be simultaneously in the position of Applicant and Respondent. (Emphasis added)

<sup>184</sup> See Legal Status of the South-Eastern Greenland, PCIJ Ser. A/B, No. 48 (1932), p. 270: [...] Whereas it follows that both the Norwegian and Danish applications are directed to *the same object* [...] Whereas, in any case, the two applications should be joined and the two applicant Governments held to be simultaneously in the position of Applicant and Respondent. (Emphasis added)

<sup>185</sup> See Appeals from certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, PCIJ Ser. A/B, No.56 (1933), p. 163: "Having regard to the Order of October 26th, 1932, whereby the Court joined the preliminary objections lodged in the two suits and fixed a time-limit within which the Czechoslovak Government might submit a written statement in regard to these objections."

<sup>186</sup> See South West Africa, ICJ Reports 1961, p. 14.

<sup>187</sup> See Continental Shelf cases, ICJ Reports 1969, p. 19.

<sup>188</sup> See G. Guyomar, Commentaire du Règlement de la Cour internationale de Justice: Interprétation et pratique (1983), pp. 300 *et seq.* According to the author: "Il est certain que la désignation de juges *ad hoc* lorsque les parties sont considérées comme faisant cause commune et la jonction d'instance, constituent deux hypothèses différentes qui ne se présentent pas nécessairement ensemble. C'est un des mérites du nouveau Règlement [de 1978] que de faire clairement cette distinction."



For instance, in the *South West Africa* cases, in dealing with the question of the appointment of a single judge *ad hoc* by the two applicants, the ICJ joined the two sets of proceedings, with the effect that thereafter single pleadings were filed and a single judgment delivered in each phase.<sup>189</sup> As can be noted, the above-mentioned procedure, called *de facto* consolidation in the field of commercial and investment arbitration, also plays a role in the consolidation of cases at the ICJ.

The issue of consolidation of cases or procedures before the ICJ has recently re-emerged in another form. Indeed in 1998, the ICJ announced a change in its working methods, stating that it would start considering some cases “back to back.”<sup>190</sup> The rationale behind such a revision of its working procedures was to allow the ICJ to expedite the examination of contentious cases brought before it, but also to deal with the major increase in the Court’s activity and the budgetary constraints it faces as a result of the financial crisis of the United Nations. One of the measures adopted by the ICJ opens the door for what can be termed a “soft consolidation” of jurisdiction-related cases:

When the Court has to adjudicate on two cases concerning its jurisdiction, it will be able to hear them “*back to back*” (that is to say, in immediate succession), so that work may then proceed on them concurrently. This innovation will be undertaken on an experimental basis, where there are appropriate cases and a pressing need to proceed rapidly.<sup>191</sup>

The concept of soft consolidation is referred to because in this situation the intent is neither to proceed to a formal joinder of cases (which would result,

<sup>189</sup> See *South West Africa* cases, ICJ Reports 1961, pp. 14 *et seq.* The Court gave the following reasons:

Whereas all Governments which, in proceedings before the Court, come to the same conclusion, must be held in the same interest; Whereas the submissions set out in the Applications are *mutatis mutandis* identical, and the texts of Applications themselves are, except in few minor respects, identical; Whereas the submissions set out in the Memorials are *mutatis mutandis* identical, and the texts of the Memorials themselves are, except in few minor respects, identical; Whereas, accordingly, for the purposes of the present case, the Governments of Ethiopia and Liberia are in the same interest before the Court and therefore, so far as the choice of a Judge *ad hoc* is concerned, to be reckoned as one party only [...] The Court joins the proceedings instituted by the Applications of the Government of Ethiopia and the Government of Liberia; Finds that the Government of Ethiopia and the Government of Liberia are in the same interest.

<sup>190</sup> See ICJ Yearbook 1998 and Press Release 98/14 available at <<http://www.icj-cij.org/icjwww/ipresscom/ipress1998/ipr9814.html>>, last visited July 14, 2006.

<sup>191</sup> *Id.*



for instance, in the rendering of a single judgment) as foreseen in Article 47 of the Rules of Court, nor to extend such a “back to back” rationale to all phases of the procedure before the ICJ, such as admissibility, merits and the hearing of witnesses, as is also provided for by Article 47 of the Rules of Court.

This soft consolidation practice was followed by the ICJ in the *Application of the 1971 Montreal Convention* cases. In those cases, the applicant filed two separate applications and requests against two respondents. Opening the oral proceedings in the provisional measures phase, the President of the ICJ stated:

For reasons of convenience, and after consultation with the Governments concerned, it has been decided that Libya, which is the Applicant and the State requesting provisional measures, will address the Court first, on the requests presented in both cases, and that will be followed by the United Kingdom in the case *Libya v. United Kingdom* and then by the United States in the case *Libya v. United States*. These *practical arrangements* are without prejudice to any decision the Court may subsequently take, under Article 47 of the Rules of Court, to join the proceedings in the two cases at any time or to direct common action in any respect in these proceedings.<sup>192</sup>

Therefore, the notion of consolidation in the ICJ’s practice covers various concepts. Some scholars like Rosenne consider that consolidation and joinder are not interchangeable terms. He argues that in the light of the cumulative experience of both the PCIJ and the ICJ, it is more appropriate to limit the term *joinder* to those instances in which a single judgment is to be given despite the initial multiplicity of proceedings.<sup>193</sup> Another point to be made is that it is commonly agreed that consolidation of cases should be distinguished from *intervention* in the proceedings of the ICJ. The Statute of the ICJ provides for two different types of interventions, namely intervention in a case where the decision in question may affect an interest of a legal nature of the state seeking to intervene (Article 62 of the Statute) and intervention in a case where the construction of a convention is in question (Article 63 of the Statute).<sup>194</sup> Intervention is different from consolidation, given the fact that intervention

<sup>192</sup> See CR 92/2, p. 15, Mar. 26, 1992 (emphasis added), quoted by Sh. Rosenne, *supra* note 181, p. 1258.

<sup>193</sup> *Id.* p. 1259.

<sup>194</sup> The two provisions are supplemented by Articles 81–85 of the 1978 Rules of the Court.

does not lead the intervenor to become a *party* to the dispute.<sup>195</sup> Thus, the intervenor is much more like a “third party” to a dispute rather than a party to a consolidated dispute.

### 6.1.2 The power of the ICJ in consolidating cases and procedures

Article 47 of the Rules of Court does not require the prior consent of states parties to a dispute for the Court to join cases.<sup>196</sup> However, in practice, the ICJ has established a long tradition of taking into account the parties’ opinions and wishes before deciding whether or not to consolidate disputes. For example, this was the situation in the *Fisheries Jurisdiction* cases, where two separate applications were brought against Iceland challenging the international validity of Icelandic legislation on the limits of fisheries. When the case reached the merits phase, the Court assessed the wishes of the parties with regard to a possible joinder of the two cases. Given the objection of the two applicants, the Court decided not to join the cases.<sup>197</sup>

Even if the Court is willing to take into consideration opinions and views of the parties, it has the discretionary power to decide whether or not to consolidate cases. The exercise of such a discretionary power may lead to dissenting opinions from some of the judges. This is what occurred at the provisional measures stage in the *Nuclear Tests* cases. Some judges dissented because they considered that a joinder was justified in light of the close connection between the questions of law and fact raised by the Australian and the New Zealand

<sup>195</sup> See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of Sept. 11, 1992, ICJ Reports 1992, para. 421.

<sup>196</sup> See *North Sea Continental Shelf*, ICJ Reports 1969, p. 19:

By a tripartite Protocol [...] it was provided [...] b) that the Parties would ask the Court to join the two cases ; c) that for the purpose of the appointment of a judge *ad hoc*, the Kingdom of Denmark and the Netherlands should be considered as being in the same interest [...] Following upon these communications, duly made to it in the implementation of the Protocol, the Court, by an Order dated 26 April 1968, declared Denmark and the Netherlands to be in the same interest, and joined the proceedings in the two cases.

<sup>197</sup> See *Fisheries Jurisdiction Case*, ICJ Reports 1974, p. 177:

[...] the Agent of the Federal Republic of Germany submitted the observations of his Government on the question of the possible joinder of the two *Fisheries Jurisdiction* cases. The Government of Iceland was informed that the observations of the Federal Republic on possible joinder had been invited, but did not make any comments to the Court [...] The Court decided not to join the present proceedings to those instituted by the United Kingdom against the Republic of Iceland. In reaching this decision the Court took into account the fact that while the basic legal issues in each case appeared to be identical, there were differences between the positions of the two Applicants, and between their respective submissions, and that joinder would be contrary to the wishes of the two Applicants.

claims, the identity of the object of the claim, and the identity of the litigant cited as respondent.<sup>198</sup>

Article 47 of the Rules of Court takes into account many eventualities, including formal joinder of proceedings leading to a single judgment (of which the operative clauses may be different), or the consolidation of separate proceedings from the point of view of the logical ordering of the hearings. This latter aspect of consolidation is illustrated in the *Legality of use of force* cases where Serbia and Montenegro brought an action against eight NATO member states. Indeed, the Court decided that a formal joinder of the proceedings would not be appropriate at the stage of the preliminary objections, even though it held public hearings simultaneously in the eight cases.

Although Article 47 of the Rules of Court seems broad in scope, consolidation of proceedings before the ICJ is not synonymous with the substantive and procedural “homogenization” of cases. Indeed, when dealing with the joinder of proceedings, the Court is guided by a certain standard of scrutiny in delineating the objective scope of each dispute. Such an approach is noticeable in the *Aerial Incident of 27 July 1955* cases.<sup>199</sup> Each of the cases, instituted by Israel, the United States and the United Kingdom against Bulgaria, arose out of a single set of facts. However, the titles of jurisdiction invoked were different, as well as the subjects of the claims and the grounds on which the claims were based. According to Rosenne, “no question of joinder arose, and it seems that the applicant governments did not wish for a single judgment to be rendered in the case on the merits.”<sup>200</sup>

The rather careful approach of the Court is more explicit in the *North Sea Continental Shelf* case where the Court stated:

Although the proceedings have thus been joined, the cases themselves remain separate, at least in the sense that they relate to different areas of the North Sea continental shelf, and that there is no *a priori* reason why the Court must reach identical conclusions in regard to them,—if for instance geographical features present in the one case were not present in the other. At the same time, the legal arguments presented on behalf of Denmark and the Netherlands, both before and since the joinder,

<sup>198</sup> See *Nuclear Tests, Interim Protection*, Order of June 22, 1973, ICJ Reports 1973, dissenting opinion of Judge Forster, p. 148; dissenting opinion of Judge Gros, p. 149; and dissenting opinion of Judge Ignacio-Pinto, p. 163.

<sup>199</sup> See *Case concerning the Aerial Incident of July 27, 1955*, Order of Nov. 26, 1957, ICJ Reports 1957, p. 182, p. 186 and p. 190.

<sup>200</sup> Sh. Rosenne, *supra* note 179, p. 552.

have been substantially identical, apart from certain matters of detail, and have been presented either in common or in close co-operation. To this extent therefore, the two cases may be treated as one.<sup>201</sup>

## 6.2 The International Tribunal for the Law of the Sea

Article 47 of the Rules of the International Tribunal for the Law of the Sea enables the Tribunal to decide that the proceedings in two or more cases be joined. The provision also enables the Tribunal to decide that the written or oral proceedings are in common without establishing any formal joinder. The possibility of the Tribunal limiting consolidation to only certain parts of the proceedings—for instance, the questions of jurisdiction and admissibility—provides some flexibility for the different positions of the parties. Thus, a distinction can be made between “formal consolidation” or “total consolidation” of cases and “informal consolidation” or “partial consolidation” of cases.<sup>202</sup>

The situations contemplated by Article 47 arise when two or more parties bring cases against the same party on the basis of the same facts and where a party submits cases against two or more parties on the basis of the same facts.<sup>203</sup> Like Article 47 of the Rules of the ICJ, Article 47 of the Rules of ITLOS foresees both consolidation of cases with multiple complainants and consolidation of cases with multiple defendants.

Article 47 of the Rules of the ITLOS was used once—in the *Southern Bluefin Tuna* cases. In July 1999, New Zealand and Australia filed Requests for the prescription of provisional measures in their dispute with Japan concerning Southern Bluefin Tuna. New Zealand’s request was received first and was entered in the List of Cases as Case No. 3. Australia’s request was subsequently entered in the List of cases as Case No. 4. The consolidation procedure contained in Article 47 of the Rules of the ITLOS allowed the two cases to be joined and listed as the *Southern Bluefin Tuna* (Requests for provisional measures) Cases. It is interesting to note that the ITLOS used a specific Order to join proceedings in this case.<sup>204</sup>

It is uncertain whether the ITLOS would have joined the proceedings without the explicit or implicit consent of the parties. This doubt arises from the fact that, in its Order, the Tribunal emphasized that in their Requests for the prescription of provisional measures, New Zealand and Australia stated that they

<sup>201</sup> North Sea Continental Shelf, *supra* note 196, p. 19.

<sup>202</sup> It can be noted that this distinction may also apply to Article 47 of the Rules of Court since that provision contains the same language as Article 47 of the ITLOS Rules.

<sup>203</sup> See G. Eiriksson, *The International Tribunal for the Law of the Sea* (2000), p. 160.

<sup>204</sup> See *Southern Bluefin Tuna* Cases, Order of Aug. 16, 1999. The ICJ issued a special Order to join cases in the *South West Africa* Cases, *op. cit.*, ICJ Reports 1961, pp. 13–15.

appeared as “parties in the same interest.” Even if the wording of Article 47 of the Rules of the ITLOS suggests some kind of a “discretionary power” to consolidate disputes, one may legitimately conclude that, similarly to the ICJ, the ITLOS is inclined to take due consideration of and give appropriate weight to the wishes of the parties. Incidentally, in one of its orders, the ITLOS showed *expressis verbis* that one legal consequence of the consolidation of proceedings—the filing by Japan of a single Statement in response to Australia and New Zealand—derives from Article 47 of the Rules and from the “consent” of Australia and New Zealand that Japan may file a single Statement in response.<sup>205</sup>

The possibility of joining a counterclaim to the original proceedings is another feature of consolidation contemplated in Article 98(3) of the Rules of the ITLOS. The possibility for a party to a dispute to present a counterclaim to the claim of the other party is generally seen as an incidental proceeding. The condition for this type of consolidation is that the counter-claim is directly connected to the subject-matter of the claim. If there is a doubt as to the connection between the issue presented by way of counterclaim and the subject-matter of the claim, the Tribunal shall decide whether or not the question shall be joined to the original proceedings. Before making its decision, the Tribunal shall hear the parties. The ITLOS has broad power to decide whether to consolidate incidental proceedings with original proceedings. Unlike the Rules of the ICJ,<sup>206</sup> the concept of “joinder” with regard to consolidation of counterclaims to the original proceedings has remained in the Rules of the ITLOS.<sup>207</sup>

### 6.3 The Dispute Settlement Body of the World Trade Organization

The power to decide whether to establish a “consolidated” panel rests with the Dispute Settlement Body (DSB), which is composed of representatives of all WTO members.<sup>208</sup> At the panel stage, a party can raise as a preliminary

<sup>205</sup> See *Southern Bluefin Tuna Cases*, Order of Aug. 27, 1999, para. 17: “Whereas, by a letter dated 6 August 1999, the parties were informed that the President, acting in accordance with Article 47 of the Rules and with the consent of Australia and New Zealand, had directed that Japan might file a single Statement in Response by 9 August 1999.”

<sup>206</sup> See *supra* note 180.

<sup>207</sup> See Article 98(3) of the ITLOS Rules: “In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Tribunal shall, after hearing the parties, decide whether or not the question thus presented shall be *joined* to the original proceedings.”

<sup>208</sup> The General Council discharges its responsibilities with respect to dispute settlement through the Dispute Settlement Body which is composed of representatives of all WTO Members. The DSB is responsible for administering the DSU. The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings or recommendations of panels or of the Appellate Body and authorize suspension of concessions or other obligations under the WTO agreements.

objection the issue of whether the panel's jurisdiction was properly established by the DSB.

One also has to bear in mind that a rather exceptional decision-making procedure is followed by the DSB at four key stages in the dispute settlement process: establishment of the panel, adoption of the panel and Appellate Body reports, and authorization of suspension of concessions and other obligations covered by the WTO agreements. At these stages, the decision is taken to accept the request for the establishment of a panel or adopt the report unless there is a consensus against it. The rule of "negative consensus" on these matters makes decision-making quasi-automatic. This contrasts sharply with the situation that prevailed under GATT 1947, when reports of panels could only be adopted on the basis of consensus. Unlike GATT 1947, the DSU provides no opportunity for blocking in decision-making. That is to say that, whenever the DSB decides to establish a "consolidated" panel, no party to a dispute can oppose its decision.

The procedure for consolidating disputes under the WTO Dispute Settlement Understanding (DSU) is rather formalized. Article 9 of the DSU provides that, where more than one WTO Member requests a panel related to the "same matter," a single panel should be established whenever feasible.<sup>209</sup> The panel must organize its examination and present its findings in such a manner that the rights that the disputants would have enjoyed, had separate panels been appointed, are in no way impaired. Article 9.1 provides for complaints to be joined where they deal with "the same matter." A matter is defined as a specific set of facts with a specific set of claims for a specific member.<sup>210</sup>

Article 9.1 of the DSU is recommendatory and not mandatory. As explained by the panel in *India-Patents (EC)*,

[g]iven their ordinary meaning, the terms of Article 9.1 are directory or recommendatory, not mandatory. They direct that a single panel *should* (not "shall") be established, and that direction is limited to cases where it is *feasible* [...] Article 9.1 is clearly a code of conduct for the DSB because its provisions pertain to the establishment of a panel, *the authority for which is exclusively reserved for the DSB*. As such, Article 9.1

<sup>209</sup> If separate disputes are consolidated, there are common terms of reference. If one dispute has already been established with its own terms of reference, it is still possible for these terms to be revised when a new party is joined as complainant.

<sup>210</sup> In the context of WTO dispute settlement, the notion of "matter," as referred to in Article 7.1 of the DSU, determines the scope of what is submitted, and what can be ruled upon, by a panel. As confirmed by the Appellate Body in the *Guatemala—Cement* case, the matter referred to the Dispute Settlement Body consists of two elements: the specific measures at issue and the legal basis of the complaint (or the claims). See Appellate Body Report, *Guatemala—Cement I*, para. 72.

should not affect substantive and procedural rights and obligations of individual Members under the DSU.<sup>211</sup>

### 6.3.1 “Semi-consolidation” in the DSU

If more than one panel is established by the DSB to examine the complaints related to the “same matter,” Article 9.3 of the DSU provides that to the greatest extent possible they should have common panelists and harmonized timetables. Article 9.3 of the DSU is an “incentive” for the consolidation of cases. Indeed, even if there is no formal joinder of cases or procedures relating to the same matter (as permitted by Article 9.1 of the DSU), it is compulsory to have the same panelists on each of the separate established panels. Article 9.3 is clearly a path for the strengthening of the principle of *res judicata* and the coherence in adjudication.

Article 9.3 of the DSU was implemented, for instance, in the *Hormones* case. The complaint of Canada and that of the United States were reviewed by two separate panels composed of the same individuals. In that case, the issue of consolidation with regard to “harmonized timetables” was objected to by the European Communities (EC). More specifically, the EC appealed the panel’s decision to hold a joint meeting with scientific experts, to give the United States and Canada access to all information submitted in both proceedings, and to invite the United States to participate and make a Statement at the second substantive meeting in the proceeding where Canada was the complaining party. The Appellate Body rejected the EC’s objection. In relation to holding one joint meeting with scientific experts, the Appellate Body considered that the decision to hold a joint meeting with the scientific experts is consistent with the letter and spirit of Article 9.3 of the DSU. The Appellate Body mentioned the “uneconomical use of time and resources” had the panel been forced to hold two successive but separate meetings gathering the same group of experts twice, expressing their views twice regarding the same scientific and technical matters related to the same contested EC measures.<sup>212</sup>

### 6.3.2 Consolidating procedures without eliminating the possibility of multiple reports

The possibility of consolidation at the WTO does not imply that a panel will render a single report in cases that have been joined. If requested by a party to the consolidated disputes, the panel must submit separate reports that may have

<sup>211</sup> See Panel Report, *India-Patents (EC)*, para. 7.14 (emphasis added).

<sup>212</sup> See Appellate Body Report, *EC-Hormones*, paras. 152–153.



identical parts (Article 9.2 of the DSU).<sup>213</sup> One of the objectives of Article 9 is to ensure that the respondent is not later faced with a demand for compensation or threatened by retaliation with respect to matters not complained of by one of the complaining parties.<sup>214</sup> If a complainant has not raised a claim at the appropriate stage, the panel report related to that complainant should reflect that fact.<sup>215</sup>

The right to ask for separate reports is guided by the principles of predictability and legal certainty. The Appellate Body in *U.S.-Offset Act (Byrd Amendment)* noted that although the text of Article 9.2 of the DSU contains no requirement for the request for a separate panel report to be made “by a certain time,” it does not explicitly provide that such requests may be made “at any time.”<sup>216</sup> The Appellate Body went on to observe that Article 9.2 must not be read in isolation from other provisions of the DSU and without taking into account the overall object and purpose of that Agreement as expressed in Article 3.3 of the DSU, the “prompt settlement of disputes.”<sup>217</sup> On this basis, the Appellate Body concluded that the right contained in Article 9.2 is not unqualified and, in particular, it cannot justify a request for a separate panel report “at any time during the panel proceedings.”<sup>218</sup>

In practice, WTO panels have used different methods of consolidation with regard to the issuance of reports. For instance, in *EC-Bananas III*, the European Communities requested the panel to prepare four panel reports—one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The panel agreed and issued four separate reports with identical descriptive parts but with findings sections that differed according to the claims of the various respondents:

[W]e have decided that the description of the Panel’s proceedings, the factual aspects and the parties’ arguments should be identical in the

<sup>213</sup> In *EC-Bananas III*, the Panel interpreted Art. 9.2 of the DSU to mean that it is obliged to “comply with such a request.” See Panel Report, *EC-Bananas III*, para. 7.57.

<sup>214</sup> See Panel Report, *EC-Bananas III*, para. 7.56:

In our view, one of the objectives of Art. 9 is to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Art. 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in a panel proceeding. Our reports must bear this objective in mind.

<sup>215</sup> See Panel Report, *EC- Bananas III*, paras. 7.55–7.58.

<sup>216</sup> See Appellate Body Report, *U.S.-Offset Act (Byrd Amendment)*, para. 310.

<sup>217</sup> *Id.* para. 311.

<sup>218</sup> *Id.*



four reports. In the “Findings” section, however, the reports differ to the extent that the Complainants’ initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements.<sup>219</sup>

In *U.S.-Steel Safeguards*, in accordance with the request by the United States to issue separate reports, the panel issued its reports in the form of one document comprising eight panel reports. The document included a common cover page, descriptive part and findings, but individualized conclusions:

In exercising our “margin of discretion” under Article 9.2 of the DSU, and taking into account the particularities of this dispute, the Panel decides to issue its Reports in the form of one document constituting eight Panel Reports. For WTO purposes, this document is deemed to be eight separate reports, each of the reports relating to each one of the eight complainants in this dispute. The document comprises a common cover page and a common Descriptive Part. This reflects the fact that the eight steel safeguard disputes were reviewed through a single panel process. This single document also contains a common set of Findings in relation to each of the claims that the Panel has decided to address. In our exercise of judicial economy, we have mainly addressed the complainants’ common claims and on that basis, we were able to issue a common set of Findings which, we believed, resolved the dispute. Finally, this document also contains Conclusions and Recommendations that are particularised for each of the complainants, with a separate number (symbol) for each individual complainant.<sup>220</sup>

An example of consolidation through the issuance of a single panel report is found in *Canada-Wheat Exports and Grain Imports*. In that case, the DSB successively had established two panels to resolve the dispute (the “March Panel” and the “July Panel”). In response to a question posed by the panel, the parties indicated that they did not wish the two panels to issue separate reports in separate documents. The two panels saw no compelling reason to proceed differently and, therefore, decided to issue their separate reports in the form of a single document.<sup>221</sup> The *Canada-Wheat Exports and Grain Imports*

<sup>219</sup> *Id.* para. 7.58.

<sup>220</sup> See Panel Report, *U.S.-Steel Safeguards*, para. 7.725.

<sup>221</sup> See Panel Report, *Canada-Wheat Exports and Grain Imports*, paras. 6.1–6.2.

case is interesting as it shows that consolidation may sometimes result from two requests for establishment of panels by the same state. In a preliminary ruling, the first panel found that certain portions of the United States' panel request that dealt with a GATT 1994 claim failed to satisfy the requirements of the DSU insofar as they did not identify the specific measures at issue.<sup>222</sup> In response to this preliminary ruling, the United States asked for the suspension of the panel's work. During that suspension, the United States filed a second request for the establishment of a panel remedying the insufficiencies of its first request with respect to its claims. The DSB established a second panel to resolve the dispute. Both panels had the same panellists, and two separate reports were issued in the form of a single document.

### **6.3.3 Consolidation of procedures, effective functioning of the dispute settlement mechanism, and the principle of due process**

The consolidation procedure established by Article 9 of the DSU is linked to Article 3.3 of the DSU.<sup>223</sup> Indeed, Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. On the basis of the *ratio legis* of Article 3.3 of the DSU, the Appellate Body has acknowledged that consolidation, by granting access to a common pool of information, enables panels and parties to a dispute to save time by avoiding duplication of the compilation and analysis of information already presented in another proceeding. For instance, in the *Hormones* case—which is closer to an example of *de facto* consolidation—due to the interactive use of the scientific information provided both by the United States and Canada, the Panel managed to finish both panel reports at the same time, despite the fact that the Canadian proceeding was initiated several months after that of the United States.

The consolidation procedure at the WTO has been developed by the interpretations of the panels and the Appellate Body. The practice of these dispute settlement bodies is also directed towards a proper application of the principle of due process. In this regard, Article 9.2 focuses on the necessity for a panel to organize consolidated procedures in such a manner that the rights

<sup>222</sup> *Id.* para. 6.10.

<sup>223</sup> Article 3.3 of the DSU reads as follows:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

that the parties to the dispute would have enjoyed had separate panels examined the complaints, are in no way “impaired.” The WTO panels consider that Article 9.2 confers upon them a broad “margin of discretion.”<sup>224</sup> To limit such a discretionary power, the Appellate Body has ruled that parties to a dispute must make a precise “claim of prejudice.”<sup>225</sup>

#### 6.3.4 Consolidation and third parties

It should be noted that issues of third-party rights are not addressed by Article 9 of the DSU, but rather by Article 10 of the DSU, and do not deal directly with the consolidation of cases.<sup>226</sup> Complainant and respondent states are the main parties to disputes in the WTO. Third parties also have an opportunity to be heard by panels and to make written submissions, provided that they have a substantial interest in the matter before the panel and that they have notified their interest to the DSB. If a third party considers that a measure that is already the subject of a panel nullifies or impairs benefits accruing to it under any WTO agreement, it may make its own request for the establishment of a panel. According to Article 10.4 of the DSU, the original panel will be assigned the new dispute “wherever possible.” In this context, Article 10.4 may be seen as an indirect means of consolidating procedures.

#### 6.4 Final remarks on the practice of the ICJ, the ITLOS and the WTO

In the three dispute settlement contexts, there are legal rules that provide for consolidation. All three organizations have made use of them and developed their own practices. In the case of the ICJ and the ITLOS, consolidation relies on the discretion of the Court and the Tribunal. However, in practice, both judicial bodies have given due consideration to the wishes of the parties.<sup>227</sup>

In the case of the WTO, the power to decide whether to establish a “consolidated” panel rests on the DSB. There is an elaborate provision on

<sup>224</sup> See Panel Report, U.S.-Steel Safeguards, paras. 10.725–10.726.

<sup>225</sup> See Appellate Body Report, EC-Hormones, para. 152.

<sup>226</sup> See U.S.-1916 Act, para. 144, where the Appellate Body stated:

Although the European Communities and Japan invoke Article 9 of the DSU, and, in particular, Article 9.3, in support of their position, we note that Article 9 of the DSU, which concerns procedures for multiple complaints related to the same matter, does not address the issue of the rights of third parties in such procedures.

<sup>227</sup> See, e.g., Fisheries Jurisdiction, ICJ Reports 1974, p. 177:

In reaching this decision, the Court took into account the fact that while the basic legal issues in each case appeared to be identical, there were differences between the positions of the two Applicants, and between their respective submissions, and that joinder would be contrary to the wishes of the two Applicants. The Court decided to hold the public hearings in the two cases immediately following each other.

consolidation in the DSU, but most of the practice regarding this issue has been developed by the panels and the Appellate Body. Consolidated procedures have even been seen as the best means of allowing for the exercise of “judicial economy.”<sup>228</sup> The practice developed by the panels and the Appellate Body gives significant importance to the principle of due process through the preservation of parties’ rights and obligations in cases involving multiple complaints. In this context, when assessing whether to consolidate cases, it is crucial to identify clearly the specific measures and the legal basis claimed by each complainant. Consolidation requires that a balance be found between the risk of unnecessary re-litigation of cases dealing with the same matter and the risk of a denial of justice by depriving a complaining state of its right to a panel under the DSU.

## 7. CONCLUSIONS

Today’s international dispute settlement scene is characterized by the proliferation of international courts and tribunals,<sup>229</sup> as well as a rising number of related proceedings (be it only because they raise the same recurrent issue). At the same time, the international legal order lacks a structural harmonizing device. Consolidation is not a panacea to the poor level of jurisdictional coordination. It can play a role, however, as a “fragmentation avoidance technique.” Assuming the appropriate rules are set, it can prevent or reduce “intra-fragmentation” by joining disputes arising in the same dispute settlement forum or under the same institutional rules. Subject to major reforms, it is, however, unlikely to reduce “inter-fragmentation” resulting from related disputes being submitted to different dispute settlement mechanisms.

This report discusses the pros and cons of consolidation and the practicalities of its implementation. It shows that consolidation may be a good device to increase the efficiency and consistency of international adjudication. It also shows that these goals only can be met if the consolidation regime is well designed and sufficiently flexible. It finally shows that the experiences of other dispute settlement systems may provide inspiration for the development of a consolidation regime in investment arbitration, but not without adaptations to account for the specificities of investment treaty disputes.

<sup>228</sup> See Panel Report, India-Autos, para. 7.214.

<sup>229</sup> See among other writings, T. Buergenthal, The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law, published in this issue of the *ICSID Review—Foreign Investment Law Journal*. W. Ben Hamida, *supra* note 49, p. 16; O. Delas/R. Côté/F. Crepeau/ P. Leuprecht (eds.), *Les juridictions internationales: complémentarité ou concurrence* (2005)

In the context of the implementation of consolidation, there essentially are two considerations to be borne in mind: consent and due process. The power to consolidate cases intrinsically is linked to the issue of the jurisdiction and competence of international tribunals. In this context, consolidation cannot be envisaged in isolation of the general principles applicable to international adjudication, one of which is the principle of consent. Thus, in all international dispute settlement fora, consolidation must be guided by the principle of the parties' consent. In investment arbitration, unless the parties give an *ad hoc* consent to consolidation, their consent will be implied in the acceptance that the arbitration would be governed by rules that provide for consolidation. The consolidation rules may be contained in the treaty itself, in the set of relevant arbitration rules, or in any other text applicable to the arbitration. Specifically, the State will give its consent by making a binding offer in the treaty to submit to arbitration under such rules, and the investor will consent when it accepts the offer by filing an arbitration under the relevant rules. The requirement of consent also means that, even where a court or a tribunal is exercising its "discretionary authority" to consolidate procedures (so for instance the action *proprio motu* in the ICJ and ITLOS), it should give attention to the wishes of the parties.

Due consideration also should be given to the principle of due process. As this report has shown, due process plays a role at two different stages of consolidation. First, it is one of the main tests when deciding whether to consolidate or not. Second, it plays a major part in the conduct of the consolidated proceedings. Obviously, fundamental principles of due process govern every adjudicatory process, regardless of consolidation. This being so, the risk of breach is heightened in cases involving multiple claimants with different complaints. Thus, arbitrators should be cautious when conducting consolidated proceedings not to fall into the "trap" of homogenization, which would consist of considering that all the claims are identical. Depending on the circumstances, they also may have to ascertain whether the confidentiality of privileged information is being protected.

In summary, the decision to consolidate as well as the consolidated proceedings must be compatible with the human right to a fair trial. A fair trial implies the right of each claimant to have his or her claims properly addressed and adjudicated. The authors hope that this final report stimulates the continuation of the debate started at the colloquium and possibly opens the way for the development of a consolidation regime in investment arbitration. But that is a project for another day.

## ANNEXES

The annexes reproduced here represent a very limited selection of relevant texts on consolidation. Many others are referred to in the report. Texts of BITs and FTAs can in particular be found at <[http://www.unctadxi.org/templates/Page\\_\\_\\_\\_1006.aspx](http://www.unctadxi.org/templates/Page____1006.aspx)>; and <<http://ita.law.uvic.ca/investmenttreaties.htm>>.

## NAFTA

*Article 1126: Consolidation*

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.
2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
  - (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
  - (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.
3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:
  - (a) the name of the disputing Party or disputing investors against which the order is sought;
  - (b) the nature of the order sought; and
  - (c) the grounds on which the order is sought.
4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.
5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article

1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

- (a) the name and address of the disputing investor;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings.

10. A disputing Party shall deliver to the Secretariat, within 15 days of receipt by the disputing Party, a copy of:

- (a) a request for arbitration made under paragraph (1) of Article 36 of the ICSID Convention;
- (b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or
- (c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:

- (a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;
- (b) within 15 days of making the request, in the case of a request made by the disputing Party.



12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within 15 days of receipt of the request.

13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 10, 11 and 12.

### **U.S. Model BIT (2004)**

#### ***Article 33: Consolidation***

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and
- (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the



claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that
  - (i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and
  - (ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

## **IISD Model Agreement**

### **Annex A**

#### ***Article 12: Consolidation***

(1) Where two or more claims have been submitted separately to arbitration under this Agreement and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order.

(2) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Director and to all the disputing parties sought to be covered by the order and shall specify in the request:

- a) the names and addresses of all the disputing parties sought to be covered by the order;
- b) the nature of the order sought; and
- c) the grounds on which the order is sought.

(3) Unless the Director finds within 30 days after receiving a request under Paragraph (2) that the request is manifestly unfounded, a separate tribunal shall be established under this Article by the Director solely to consider the issue of consolidation.

(4) Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- c) instruct a tribunal previously established to assume jurisdiction over, and hear and determine together, all or part of the claims, provided

that that tribunal shall decide whether any prior hearing shall be repeated.

(5) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration and that has not been named in a request made under Paragraph (2) may make a written request to the tribunal that it be included in any order made under Paragraph (4), and shall specify in the request:

- a) the name and address of the claimant;
- b) the nature of the order sought; and
- c) the grounds on which the order is sought.

(6) On application of a disputing party, a tribunal established under this Article, pending its decision under Paragraph (4), may order that the proceedings of another tribunal be stayed, unless the latter tribunal has already adjourned its proceedings.